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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

MELODY PERKINS, Petitioner

vs.

GENERAL MOTORS CORPORATION, Respondent

MELODY PERKINS, Petitioner,

vs.

THOMAS SPIVEY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

Gwen G. Caranchini
Counsel of Record
3101 Broadway
Suite 420
Kansas City
Missouri 64111
(816) 931-2800

Robert K. Ball II
On Brief
1125 Grand Avenue
Suite 500
Kansas City
Missouri 64106
(816) 471-1060

ATTORNEYS FOR PETITIONER
MELODY PERKINS

Question Presented

Did the Eighth Circuit correctly hold that Seventh Amendment infractions are **only** required to be corrected by Petitioner being given a jury trial of her erroneously dismissed negligence claim, but does not require the setting aside of the bench tried Title VII Judgment or the Summary Judgment on Petitioner's common law damage claim based on that bench tried Title VII judgment, **where all claims arise out of the same facts?**

List of the Parties

The parties to the proceedings below were Melody E. Perkins, plaintiff and appellant below; General Motors Corporation and Thomas Spivey, defendants and appellees below.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
LIST OF PARTIES.....	i
OPINIONS BELOW.....	1
JURISDICTION.....	4
CONSTITUTIONAL PROVISION AND CIVIL PROCEDURE RULE INVOLVED.....	5
STATEMENT OF THE CASE.....	6
A. Course of Proceedings Below...	6
B. Statement of the Facts.....	13
REASONS FOR GRANTING THE WRIT.....	25

Did the Eighth Circuit correctly hold that Seventh Amendment infractions are **only** required to be corrected by Petitioner being given a jury trial of her erroneously dismissed negligence claim, but does not require the setting aside of the bench tried Title VII Judgment or the Summary Judgment on Petitioner's common law damage claim based on that bench tried Title VII judgment, **where all claims arise out of the same facts?**

CONCLUSION.....	55
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APPENDICES

Appendix A August 29, 1990 Order
of the Eighth Circuit Court of Appeals
Denying Appellant's Petition for

Rehearing and Suggestions for	
Rehearing en Banc.....	A-1

Appendix B August 29, 1990 Order of the Eighth Circuit Court of Appeals Denying Appellee General Motors's Petition for Rehearing and Suggestion for Rehearing en Banc.....	B-1
---	-----

Appendix C July 24, 1990 Order of the Eighth Circuit Court of Appeals Affirming District Court's Findings of Facts and Conclusions of Law in Title VII case; Affirming District Court's Grant of Summary Judgment in Separate Action against Spivey, and Remanding Negligence Claim against General Motors for Jury Trial.....	C-1
---	-----

Appendix D April 19, 1989 Order of the District Court Granting Spivey's Motion for Summary Judgment in Separate Action on Grounds of Collateral Estoppel.....	D-1
--	-----

Appendix E April 10, 1989 District Court Findings of Fact, Conclusions of Law and Order Granting Judgment for General Motors in Perkins' Title VII Claim	E-1
---	-----

Appendix F October 28, 1988 Order of the District Court Dismissing Negligence Claim against General Motors.....	F-1
--	-----

Appendix G Amendment VII-- Civil Trials.....	G-1
--	-----

Appendix H F.R.Civ. P. 38.....	H-1
---------------------------------------	-----

TABLE OF AUTHORITIES

<i>Beacon Theatres, Inc. v. Westover</i> , 359 U.S. 500 (1959).....	35, 36, 37, 43, 52, 53, 55, 56.
<i>Blonder-Tongue Lab, Inc. v. University of Illinois Found.</i> , 402 U.S. 313 . (1971).....	45, 47, 55.
<i>Curtis v. Loether</i> , 415 U.S. 189 (1974).....	31, 34, 55, 56.
<i>Dairy Queen, Inc. v. Wood</i> , 369 U.S. 469 (1962).....	35, 37, 43, 52, 55, 56.
<i>Lytle v. Household Mfg, Inc.</i> , 110 S. Ct. 1331 (1990).....	12, 13, 24, 27, 28-33, 37, 40-43, 45-46, 51-53, 55-56.
<i>Parklane Hosiery Co., Inc. v. Shore</i> , 439 U.S. 322 (1979).....	35-36, 40-41, 43, 45, 47-48, 51-56.
Seventh Amendment.....	i, 2, 5, 24-28, 30-31, 33, 35, 40-43, 48, 50, 52-56.
F.R.Civ.P. 38.....	3, 5, 24, 30, 39.

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THOMAS SPIVEY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE
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THE EIGHTH CIRCUIT

Petitioner Melody Perkins
respectfully prays that a Writ of
Certiorari issue to correct the judgment
and opinion of the United States Court of
Appeals for the Eighth Circuit, entered
in the above entitled proceeding on July
24, 1990.

OPINIONS BELOW

The Order of the United States District Court for the Western District of Missouri (The Honorable D. Brook Bartlett) granting Summary Judgment to General Motors on Melody Perkins' negligence claim is reprinted in the Appendix hereto, pp. F-1 to F-11, *infra.*; the Findings of Fact and Conclusions of Law of the United States District Court (The Honorable D. Brook Bartlett) in Perkins' Title VII suit against GM reprinted in the Appendix hereto, pp. E-1 to E-68, *infra.*; the Order of the United States District Court (The Honorable Scott O. Wright) granting Summary Judgment to Thomas Spivey in Perkins' common law suit against him reprinted in the Appendix hereto, pp. D-1 to D-12, *infra.*; the Order of the

United States Court of Appeals for the Eighth Circuit remanding for trial by jury Melody Perkins' negligence claim against GM, affirming the District Court's Findings of Facts and Conclusions of Law in Perkins' Title VII suit, and affirming Summary Judgment in separate suit against Spivey, reprinted in the Appendix hereto, pp. C-1 to C-53, *infra.*; the Order of the Eighth Circuit Court of Appeals denying Appellee General Motors' Petition for Rehearing and Suggestion for Rehearing En Banc reprinted in the Appendix hereto, pp. B-1 to B-2, *infra.*; the Order of the Eighth Circuit Court of Appeals denying Appellant Melody Perkins' Petition for Rehearing and Suggestion for Rehearing en Banc reprinted in the Appendix hereto, pp. A-1 to A-2, *infra.*

JURISDICTION

Petitioner Melody Perkins seeks review of that part of the July 24, 1990 Order of the United States Court of Appeals for the Eighth Circuit affirming the District Court's Finding of Facts and Conclusions of Law in Perkins' Title VII suit against General Motors and affirming the District Court's grant of Summary Judgment in a separate common law suit against Spivey; and the August 29, 1990 Order of the United States Court of Appeals for the Eighth Circuit Denying Melody Perkins' Petition for Rehearing and Suggestions for Rehearing en Banc on those issues.

The jurisdiction of this Court to review the Judgement of the United States Court of Appeals for the Eighth Circuit is invoked under 28 U.S.C. Sec. 1254(1).

**CONSTITUTIONAL PROVISIONS AND
FEDERAL RULE OF CIVIL PROCEDURE**

Amendment VII -- Civil Trials

In Suits at common law, where the value in controversy shall exceed \$20.00., the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

**F. R. Civ. P. 38
Jury Trial of Right**

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10

days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) **Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(e) **Admiralty and Maritime Claims.** These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

STATEMENT OF THE CASE

A. Course of proceedings and Disposition in The Courts Below

Perkins filed a negligence suit against GM in the District Court¹, based on diversity of citizenship, on May 27, 1986, wherein she claimed that GM had failed to provide her a safe workplace

¹ All trial filings were in the United States District Court for the Western District of Missouri, Western Division.

and one free from sexual attacks and harassment by Spivey and harassment by other men; she also claimed that GM's failure to hire, retain and train GM male supervisors, including Thomas Spivey, during the time that she worked in the Fairfax plant, resulted in her sexual harassment and constructive discharge in January 1986 from her supervisory employment at the Fairfax, Kansas plant. She also filed a separate action against Thomas Spivey in Missouri state court for assault, battery and intentional infliction of emotional distress.

That month after her discharge Melody Perkins initiated a complaint with the Equal Opportunity Commission against GM for sexual discrimination, but because of her extended hospitalization, she was not able to complete the filing until

May, 1986.

GM moved to dismiss Melody Perkins' negligence suit on the basis that it was barred by the Kansas Worker's Compensation statutes. On November 3, 1987 the District Court stayed the action, and referred the question presented by GM to the Kansas Division of Worker's Compensation on a stipulated set of facts to determine whether the negligence claims were in fact under the jurisdiction of the Kansas Division of Worker's Compensation. The Kansas Division of Worker's Compensation found the claims were not within its jurisdiction and, after two unsuccessful appeals by GM to the District Court of Wyandotte County, Kansas, GM desisted from this avenue; jurisdiction of the matter was resumed by the United States

District Court in February, 1987.

In January, 1987, after she requested and obtained administrative closure by the EEOC of her Title VII claim, Melody Perkins filed suit thereon in the United States District Court. On her Motion, which was unopposed by GM, the negligence and Title VII suits were consolidated for discovery and trial. Discovery proceeded on the consolidated suits.

In November 1987 Melody Perkins sought to add her suit against Spivey to the consolidated claims then pending in Federal Court by amending the negligence claim. This was denied by the District Court. Melody Perkins then dismissed her separate state suit against Spivey and refiled that separate suit in Federal Court. Although the District Court gave

as grounds for denying leave to amend the delay and adding of issues, it extended discovery² to March 15, 1988; it did not take up and rule GM's further Motions for Summary Judgment filed in May until October, 1988, during which month the District Court (a) struck Melody Perkins' damage claims from Spivey's conduct preceding 1982 and (b) granted Summary Judgment on Melody Perkins' common law negligence suit against GM.

The Title VII suit was tried to the court³, who at its conclusion, ruled from the bench in favor of GM, but requested Proposed Findings of Fact and Conclusions

² Much of which was participated in, and had been participated in, by Spivey.

³ Thirty one days between November 1, 1988 and January 9, 1989. Closing arguments were made January 11, 1989.

of Law be submitted by the parties.⁴

A trial was set by Judge Wright on the common law suit by Melody Perkins against Spivey for April 1989. On April 10, 1989 Judge Bartlett issued his Findings of Fact and Conclusions of Law confirming his bench ruling for GM. On April 19, 1989 Judge Wright granted collateral estoppel effect to the Judgment in *Perkins v. GM* and entered Summary Judgment for Spivey on Melody Perkins' suit against him.

On May 10, 1989 Melody Perkins filed her notice of appeal from the orders and Judgments by Judge Bartlett including his orders in failing to grant leave to amend to add Spivey and in dismissing her negligence claims against GM. On May 15,

⁴ GM's first, to be "countered" by those submitted by Perkins 10 days later.

1989 she filed her Notice of Appeal from Judge Wright's April 19, 1989 order granting Summary Judgement to Spivey. These cases were thereafter consolidated on appeal. On July 24, 1990 the Eighth Circuit filed its opinion reversing the finding of the District Court in dismissing Melody Perkins' negligence suit, but affirmed the District Court's Title VII Findings of Fact and Conclusions of Law and the Summary Judgment finding in Spivey's favor. The Eighth Circuit specifically found that *Lytle v. Household Mfg. Co., Inc.*, 110 S.Ct. 1331 (1990) did not require the vacation of the Title VII Findings of Fact and Conclusions of Law, nor the Summary Judgment based on collateral estoppel therefrom in Spivey's favor. Melody Perkins' Petition for Rehearing

and Suggestion for Rehearing en Banc pointed out this apparent misapplication of *Lytle* to the Eighth Circuit; this was denied August 29, 1990.

B. Statement of the Facts

Melody Perkins is a homosexual female who has been in a homosexual relationship with Jessica Glenn since 1974. Melody Perkins went to work for General Motors at its Fairfax plant in Kansas City, Kansas, on July 24, 1978 as a first line supervisor in the Body Shop. It was here Melody Perkins, in her mid twenties, first encountered Thomas Spivey, almost 25 years her senior, who was the Body Shop superintendent and her indirect supervisor.

On May 1, 1980 Melody Perkins was laid off from the Fairfax plant and on October 1, 1980 she was accepted for

employment at the Bowling Green, Kentucky GM Corvette plant, where she also worked as a supervisor on the line. Jessica Glenn was also laid off from the line in 1980 and joined Melody Perkins in Bowling Green, Kentucky to work on line. Spivey did not go to Bowling Green but remained in the Body Shop at Fairfax.

In 1982 Melody Perkins and Jessica Glenn returned to the Kansas City, Kansas Fairfax plant, Melody Perkins again as a first line supervisor and Glenn on the line. Again, Spivey was her indirect supervisor as either the superintendent of the Body Shop or acting general superintendent at the Fairfax Plant. Except for periods of training, layoff, transfer, special assignment or disability, Melody Perkins was employed as a first line production supervisor in

the Body Shop at the Fairfax Plant until January 30, 1986, when she left the plant after suffering a total emotional breakdown and informing upper management Spivey had coerced her into maintaining a sexual relationship with him at the Fairfax plant since shortly after July 1978. She said he so insisted as a condition of her maintaining her job at the plant.

Since January 30, 1986 Melody Perkins has been on disability leave from GM and has been receiving social security benefits resulting from the emotional trauma she suffered caused by her sexual harassment by Spivey and the hostile environment⁵ at the plant.

Melody Perkins testified that while

⁵ This environment consisted of daily catcalls, leering, sexual gestures, sexual jokes, pinups directed at Perkins or in her presence.

she was employed at the Fairfax plant, both before and after her employment in Bowling Green, Kentucky, she was sexually harassed by Spivey and other males in the plant. Melody Perkins stated that shortly after she went to work at Fairfax Spivey forced her to have sexual intercourse with him on a continuing basis in order to retain her job; and that this nonconsensual sexual intercourse amounted to "rape". Spivey, separated from his wife during this time period, contended that although he knew Perkins was "gay", she "consented to the relationship" because he was so great in bed.⁶

Melody Perkins told no one of the relationship, (not even her homosexual

⁶ When questioned about his sexual prowess Spivey claimed his staying power of five minutes was what made him so great in bed.

partner), during the entire time that it was transpiring because she was in fear Spivey would kill her or her partner or she would lose her job. Melody Perkins asserted that Spivey repeatedly threatened her with knives, shot guns over her head, and once inserted a gun in her vagina and cocked the gun. She said she was frequently nauseous and physically ill after the sexual encounters. According to her homosexual partner, she was "withdrawn" after attending "late meetings at the plant", although Jessica Glenn did not know why. During these years Melody Perkins bought a succession of highly trained and expensive guard dogs which she said made her feel safe in her home. Prior to this she had always had "cocker spaniels".

In the spring of 1985 Melody Perkins

told Spivey she would submit no more. She started to actively attempt to move out of the Body Shop, but Spivey prevented this. To force Melody Perkins to again submit to him, in the summer of 1985 Spivey became highly critical of Melody Perkins' work as well as those who reported to her; he also downgraded her review and had her direct supervisors bring increasing pressure on her daily work performance. When Melody Perkins finally left the plant January 30, 1986, after some seven years of working for GM, she was still a first line supervisor who had never been promoted and who had maintained average ratings under Spivey and above average ratings when away from Spivey.

After Melody Perkins left the plant, she was admitted to the hospital for

psychiatric evaluation and counseling, where she remained until March 1986. During this confinement she informed Glenn of her ordeal with Spivey for the first time. Between February 1986 and October 1988 prior to trial⁷, Melody Perkins participated in over 600 hours of therapy by a psychiatrist and two psychologists, and was confined in psychiatric hospitals on two additional occasions resulting from her emotional trauma at the hands of Spivey and other men at the Fairfax plant. Melody Perkins' physicians opine that she was the survivor of childhood sexual and mental abuse at the hands of her parents, an ex-husband who beat her, and that this was repeated by Spivey and the hostile environment at the plant. Their

⁷ This therapy continues still.

diagnosis was post traumatic stress syndrome.

Spivey testified he told no one of the "liaison" with Melody Perkins until questioned by GM management in 1986, after Melody Perkins complained; he said the extent of their "consensual relationship" consisted of periodic sexual meetings at his townhouse or home and that they never went anywhere in public together, except for one trip for a weekend early on in the "relationship".

Hostile Environment at GM's Fairfax Plant

Melody Perkins testified that the environment was hostile for her and other women at the GM Fairfax plant. During discovery and trial she and other women testified about the daily harassment they were subjected to which consisted of leering gestures, sexual jokes and

catcalls. Women supervisors repeatedly testified that the only women who did receive promotions were those who "slept" with upper managers and that these women's career successes followed their affairs. One woman, who was the first woman supervisor at Fairfax, traveled from Florida to testify at trial about the mental abuse she had suffered at Spivey's hands as a supervisor ten years before. She too had left the plant in mental collapse from employment in the Body Shop three months before Melody Perkins arrived there in July 1978.

Spivey's History at GM's Fairfax Plant

Spivey had a history of problems with upper management at the plant which were documented in his personnel file. At one point in time in 1981-1982 his file reflects a serious drug and drinking

problem as well as documented fights with women. A memo in his file from his wife indicates he needed psychiatric help. Another memo in the file during the same time period indicates upper management believed he lied to them. At least two upper managers testified during discovery that they considered him dishonest, untrustworthy and power hungry. These upper level managers also indicated that if they had been aware that Spivey wore a belt with a concealed knife belt buckle, which Melody Perkins testified he threatened her with in the privacy of his office during work, they would have fired him.

District Court Findings & Judgments

Against this background the District Court found Melody Perkins had not stated any common law damage claim against GM

for negligent retention of Spivey, under the law of Kansas⁸ and, after a 31 day bench trial, found that Melody Perkins' relationship with Spivey was consensual, and entered Findings and Judgment accordingly⁹. Based on these Findings the District Court in the Spivey case held Perkins collaterally estopped and entered summary judgment against her¹⁰.

Opinion and Judgment in the Eighth Circuit

These Judgements were all appealed

⁸ *Perkins v. General Motors*, Case No. 86-0665-CV-W-9 in the United States District Court hereinafter referred to as Perkins vs. GM, common law action or Perkins common law action against GM; [Court of Appeals No. 89-2136WM].

⁹ *Perkins v. General Motors*, Case No. 87-0048-CV-W-9 in the United States District Court, hereafter referred to as Perkins vs. GM, Title VII or Perkins Title VII claim; [Court of Appeals No. 89-2136WM].

¹⁰ *Perkins v. Thomas Spivey*, Case No. 88-02130CV-W-5 in the United States District Court, hereafter referred to as Perkins vs. Spivey or Spivey.; [Court of Appeals No. 89-1833WM].

to the United States Court of Appeals for the Eighth Circuit where they were consolidated. The Eighth Circuit by opinion filed July 24, 1990 held that the District Court had violated the Seventh Amendment right to jury trial, as implemented by F. R. Civ. P. Rule 38, in erroneously dismissing Melody Perkins' common law damage suit against GM, holding that such suit was permissible under the common law of Kansas, thus mandating a jury trial under the Seventh Amendment as declared by decision of this Court in *Lytle v. Household Mfg. Co., Inc.*, supra. However, the Eighth Circuit affirmed the Findings of Fact and Conclusions of Law of the District Courts on Melody Perkins' Title VII suit and the Summary Judgment on her common law damage suit against Spivey, based upon

collateral estoppel from those Title VII Findings of Fact and Conclusions of Law.

Melody Perkins' Motion for Rehearing and Suggestion for Rehearing en Banc was denied by the Eighth Circuit, and this Petition for Writ of Certiorari follows.

REASON FOR GRANTING WRIT

Did the Eighth Circuit correctly hold that Seventh Amendment infractions are **only** required to be corrected by Petitioner being given a jury trial of her erroneously dismissed negligence claim, but does not require the setting aside of the bench tried Title VII Judgment or the Summary Judgment on Petitioner's common law damage claim based on that bench tried Title VII judgment, **where all claims arise out of the same facts?**

Melody Perkins, Petitioner (and Plaintiff-appellant¹¹), respectfully

¹¹ In Appeal Nos 89-2136W and 89-1833WM before the U.S. Court of Appeals for the Eight Circuit. These appeals involved the 3 separate suits that were separately numbered in the District Court, mentioned in Notes 8, 9 and 10, *supra*. The
(continued...)

suggests that this Court should issue its Writ of Certiorari herein to the United States Court of Appeals for the Eighth Circuit, on the issue of her right to a jury resolution of all the factual issues common to each of her suits for damages (Appendix C-34):

" If the district court finds that a genuine issue as to material fact exists as to Perkins' allegations against GM concerning its negligent retention of Spivey, then Perkins must be given a jury trial."

in order for the Constitutional mandate of the Seventh Amendment right to jury trial, as most recently declared by this Court in *Lytle v. Household Mfg. Co.*,

¹¹(...continued)

2 against GM, were consolidated for discovery and trial by the District Court, and all of them were consolidated before the Court of Appeals.

Inc., *supra.* to be fully implemented and recognized. This, as required by that opinion and other opinions of this Court. The Eighth Circuit by refusing to vacate the Title VII Findings and the Summary Judgement, based upon collateral estoppel therefrom, pending a jury trial resolution of the common factual issues has subverted the mandate of the Seventh Amendment as much as did the District Court and Fourth Circuit in *Lytle*.

Preliminary

This appeal was taken without a transcript of the trial before Judge Bartlett in *Perkins vs GM, Title VII*. Petitioner and her counsel know this may be troublesome to this Court, for which

she apologizes¹². However, she respectfully suggests that the presence or absence of a transcript has nothing to do with the issue of denial of the Seventh Amendment right to jury trial, or the nature and extent of the relief to be accorded when that denial is found. This, because, as we understand the decisions of this Court in *Lytle* (and cases cited therein) any evidence shown in a transcript could not be weighed by this Court, the Court of Appeals or the District Court if a jury trial was denied in violation of the Seventh Amendment. We respectfully suggest that the Findings

¹² Appellant, in her defense, points out that she was denied having same furnished on her application to appeal *in forma pauperis* by both the District Court and the Court of Appeals. This, in spite of the fact that she has been without support from her employment due to her disability, as shown by applications and affidavits filed in those Courts.

of Fact by the District Court are sufficient proof that Melody Perkins made a submissible case on the underlying claim of misconduct by Spivey, since the District Court finds her evidence directed to that issue to be not credible. Thus, the findings themselves prove there was *competent and substantial* evidence to prove her claims, although it was not *credible* to the District Court. That finding of *credibility* is, of course, what the jury could and should have made, thus Constitutionally preempting it from being made by the District Court.

The Holding in *Lytle v. Household Mfg., Inc.*, 110 S. Ct. 1331 (1990) That The 7th Amendment Requires: (A) A Retrial of Lytle's 1981 Claim, And (B) The Vacation of The Collateral Estoppel Effect By The Court Of Appeals And Also The Findings of Fact by the District Court In *Lytle's* Title VII Action, Mandates Such Be Ordered Here, If The District Court Determines Plaintiff Is Entitled To A Jury Trial.

This, Under The Standard Required By This Court In *Lytle*. The Opinion Of The Court Of Appeals, In Failing To So Require, Conflicts With The Decision Of This Court In *Lytle*.

In two of the complaints in the District Court, *Perkins vs GM*, common law action, and *Perkins vs Spivey*, Petitioner made demand for jury trial as provided under Rule 38 F. R. Civ. P.¹³

The Seventh Amendment to the Constitution guarantee of a jury trial states:

"Civil trials

In Suits at common law, where

¹³ Since 1966 Rule 38 has provided, in pertinent part:

"(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

* * * *

(d) Waiver. * * * A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved *

* *"

In *Curtis v. Loether*, 415 U.S. 189, 193 (1974), in holding that jury trial, and thus retrial, of Melody Perkins' Title VII claim was required, because improperly "Judge tried" in violation of the Amendment, this Court noted that while the right so preserved was that which existed at the time of the adoption of the Seventh Amendment, this did not limit the applicability of the guarantee of the Amendment to modern causes of action.

In *Lytle vs. Household Mfg., Inc.*, supra, plaintiff filed a Sec. 1981 claim with one under Title VII, all for damages for termination of his employment, and

retaliation against him for filing the EEO claim by providing inadequate references to prospective employers. In that complaint Lytle requested a jury trial. The District Court dismissed Lytle's Sec. 1981 claim and on trial of the Title VII claim (to the Court) granted a Rule 41(b) Motion to Dismiss on the "discriminatory discharge claim" at the close of plaintiff's evidence, and entered judgment for defendant on the retaliation claim at the close of all the evidence. On appeal, the Court of Appeals for the Fourth Circuit affirmed holding that the Sec. 1981 claim was erroneously dismissed, but nevertheless collaterally estopped plaintiff from proceeding on that Sec. 1981 claim by the findings of fact made by the District Court in the Title VII claim, affirmed

the judgment *in toto* and (110 S. Ct. at 1335):

" * * * (R)ejected Lytle's claim that the Seventh Amendment precluded according collateral estoppel effect to the District Courts findings, reasoning that the judicial interest in economy of resources overrode Lytle's interest in relitigating the issue before a jury. * * *"

This Court reversed, stating and holding (110 S. Ct. at):

(1335)

" * * * (H)ad the District Court not dismissed Lytle's Sec. 1981 claims, Lytle would have been entitled to a jury trial on those claim. See *Patterson vs. McClean Credit Union*, 49 U.S. ___, ___,

109 S.Ct. 2363, 2379, 105 L.Ed 2d
132 (1989) (BRENNEN J., DISSENTING).

When legal and equitable claims are
joined in the same action, 'the
right to jury trial on the legal
claim, including all issues common
to both claims, remains intact',
Curtis vs. Loether, 415 U.S. 189,
196, n. 11, 94 S.Ct. 1005, 1009, n.
11, 39 L.Ed. 2d 260 (1974).

Further, had the Sec. 1981 claims
remained in the suit, a jury would
have been required to resolve those
claims before the court considered
Title VII claims, because 'only
under the most imperative
circumstances, circumstances which
in view of flexible procedures of
the Federal Rule we cannot now
anticipate, can the right to a jury

trial of legal issues be lost through prior determination of equitable claims.' *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-511, 79 S.Ct. 948, 956-057, 3 L.Ed.2d 988- (1959) (Footnote omitted). *Accord Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473, 82 S.Ct. 894, 897, 8 L.Ed.2d 44 (1962). * *

* "

(1336-1337)

"In *Parklane Hosiery Co.*, this court held that 'an equitable determination can have collateral estoppel effect in a subsequent legal action and that this estoppel does not violate the Seventh Amendment.' 439 U.S. App. 335, 99 S.Ct., at 653 (emphasis added). In that case, a judgment had already

been issued by a District Court and affirmed on appeal in a suit in which a jury trial was not constitutionally required. * * *

Respondent argues that this case is governed by *Parklane Hosiery Co.* rather than by *Beacon Theatres*, because the District Court made its findings when no legal claims were pending before it. In respondents view, if an appellate court finds that a trial courts dismissal of legal claims was erroneous and remands the legal claims to the trial court, that case would in effect constitute a separate action and therefore be subject to collateral estoppel under *Parklane Hosiery Co.*.

We are not persuaded. Only the

District Courts erroneous dismissal of the Sec. 1981 claims enabled that court to resolve issues common to both claims, issues that otherwise would have been resolved by a jury. But for that erroneous ruling, this case would be indistinguishable from *Beacon Theatres and Dairy Queen*. It would be anomalous to hold that a District Court may not deprive a litigant of his right to a jury trial by resolving an equitable claim before a jury hears a legal claim raising common issues, but that a court may accomplish the same result by erroneously dismissing the legal claim. Such a holding would be particularly unfair here because *Lytle* was required to join his legal and equitable claims to avoid the

bar of res judicata. See *Barnett vs. Billman*, 800 F.2d 1308, 1315 (CA4 1986) (Holding that prior adjudication barred a claim that arose out of the same transaction and that could have been raised in prior suit). Our conclusion is consistent with this courts approach in cases involving a wrongful denial of a petitioners right to a jury trial on legal issues. In such cases, we have never accorded collateral-estoppel effect to the trial courts factual determinations. Instead, we have reversed and remanded each case in it's entirety for a trial before a jury. See *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160, 84 S.Ct.273, 11 L.Ed.2d 261 (1963) (*per curium*) (reversing

trial courts decision to try equitable claims first and thereby to bar jury trial on legal claims that relied on the same facts); *Tull vs. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987) (reversing and remanding claims for monetary penalties and injunctive relief because trial court improperly denied plaintiff a jury trial on the claims for monetary penalties); *Granfinanciera, S.A. v. Nordborg*, 492 U.S. ____, 109 S.Ct.2782, 106 L.Ed.2d 26 (1989) (reversing and remanding bankruptcy courts judgment because petitioners were denied a jury trial and according no weight to trial judges factual findings)."

And this Court concluded (at page 1338):

"We decline to extend *Parklane Hosiery Co., supra*, and to accord collateral estoppel affect to a District Court's determination of issues common to equitable and legal claims where the court resolved the equitable claims first solely because it erroneously dismissed the legal claims. To hold otherwise would seriously undermine a Plaintiff's right to a jury trial under the Seventh Amendment. We therefore vacate the judgment of the Fourth Circuit, vacate the decision of the District Court with respect to Lytle's Title VII claims[n. 4.], and remand for proceedings consistent with this opinion".
(emphasis in original and supplied)

"[n. 4.] Vacating the District Court's determinations regarding Lytle's Title VII claims is required to afford Lytle complete and consistent relief. *Had his Sec. 1981 claims not been dismissed, the jury's determinations of legal and factual issues could not have been disregarded when the District Court considered his equitable claims. Moreover, vacating the District Courts judgment avoids the possibility of inconsistent determinations. See Montana v. United States, 440 U.S. 147, 154, 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979) (noting that inconsistent decisions pose threat of diminishing reliance on the judiciary).*"

Clearly this Court in *Lytle* holds that while collateral estoppel may deprive one of 7th Amendment rights in a subsequent proceeding (*Parklane*), it cannot be used to defeat the right to jury trial in the same proceedings, i.e. the "chancellor's" jurisdiction is secondary to the Seventh Amendment.

By proceeding with the bench trial after improperly holding against Melody Perkins on her common law action against

GM for negligent retention of Spivey, Judge Bartlett violated the legal duty imposed on him by the Seventh Amendment to let the jury *first* determine the facts, as explicitly held in the above quoted holdings in *Lytle*¹⁴. The Court of Appeals opinion, we submit, violently conflicts with the decision by this court in *Lytle* that it would be anomalous to hold a trial judge committed no error where he improperly dismissed the common law claim and then proceeded to make "equitable findings" that are binding for

¹⁴ The Court of Appeals reverses District Judge Bartlett, holding that he improperly dismissed Perkins common law claim for negligent retention of Spivey, and orders a jury trial *in accord with the decision in Lytle*, should Judge Bartlett determine there is an extant material fact on GM's motion for summary judgment in that common law action, (Court of Appeals Opinion, pp. 16-17), *but then affirms the equitable findings and gives them collateral estoppel effect in Spivey* (Court of Appeals Opinion pp. 3, 20-21, 22-23, 24), *contrary to Lytle!*

purposes of collateral estoppel, but there is error where he proceeds to hear the same case without a jury. Obviously, in *Lytle* it is reasoned, the result is the same in both cases: the command of the Seventh Amendment is subverted. There is nothing to legally distinguish the result achieved by application of collateral estoppel by the Court of Appeals in *Lytle* from affirmation of its application by the Court of Appeals in the instant matter.

The Court of Appeals indicates a partial resolve to enforce the command of the Seventh Amendment in its holding that *Perkins vs GM, common law action*, is to be remanded for jury trial, but disregards the express holdings in *Lytle*, *Beacon Theaters and Dairy Queen, supra*, and *Parklane Hosiery, infra.*, by

thereafter holding that the findings of fact in *Perkins vs GM*, Title VII, are affirmed and must be given collateral estoppel effect in *Perkins vs Spivey*! This, even though those findings may be contrary to the findings of the jury in *Perkins vs GM*, common law action: which the Court of Appeals orders be accorded Melody Perkins if the District Court finds a material fact in issue for such resolution!¹⁵ Thus, even though collateral estoppel effect cannot be

¹⁵ We believe it implicit in the opinion of the Court of Appeals that it requires the District Court to *determine* whether or not a material fact is in dispute in ruling the summary judgment motion filed by GM in Perkins common law action against GM. The motion is thus required to be ruled as a matter of fact, rather than as a matter of law, since the Court of Appeals holds that the District Court erroneously sustained the motion as a matter of law. We do not believe that the Court of Appeals was ordering the District Court to accord collateral estoppel effect to any part of the findings of fact by it in the Title VII proceedings in *Perkins vs GM*, in so ruling that summary judgment motion in the common law action.

given the findings from the Title VII action to sustain GM's motion in the common law action, preclusion is allowed in *Spivey*! This, the opinion reasons, because *Perkins vs Spivey* is a subsequent action under the Supreme Court holdings in *Parklane Hosiery* and *Blonder-Tongue Lab.*

This is not only contrary to *Lytle*, it is contrary to both *Parklane Hosiery* and *Blonder-Tongue Lab* because in both those cases the underlying judgment was final¹⁶. The judgment in *Perkins vs GM*, consolidated cases, is not yet "final" because the Court of Appeals remands for further proceedings! If the mandate by

¹⁶ "Final" meaning that in both of these cases the underlying judgment had been tried, appealed and affirmed, thus making them final for all purposes. See: *Parklane Hosiery Company v. Shore*, 438 U.S. at 325 (1978); and *Blonder-Tongue Lab., Inc., v. University of Illinois Found.*, 402 U.S. at 314-315 (1971).

the decision of this Court in *Lytle* be followed, no such anomaly would result because all common factual determinations would depend upon jury trial resolution.

Further, since *Perkins vs GM*, common law action, is to be resolved by a jury trial [if the District Court finds a genuine issue as to *material fact* (Court of Appeals Op., Appendix C-34)], *Spivey* should be ordered consolidated therewith to avoid any inconsistent results, or the District Court ordered to consider such consolidation if it so finds the *material fact issue*. We respectfully suggest this would avoid the otherwise anomalous result of *Spivey* being collaterally estopped by facts that may well be later vacated by a jury verdict in *Melody Perkins* common law action against GM!

Moreover, neither of the decisions

by this Court in *Blonder-Tongue Lab, Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971)¹⁷ nor *Parklane Hosiery Company v. Shore*, 439 U.S. 322 (1978) would permit the anomalous result reached by the Eight Circuit herein.

The *Parklane Hosiery* case involved a common law suit for damages, where *Parklane* was held to be collaterally estopped from again litigating the issue that its proxy statement was false and misleading, since that issue had been determined by judgment in an earlier proceeding by the SEC against *Parklane*,

¹⁷ *Blonder-Tongue* is cited in this petition because it is cited with *Parklane Hosiery* in the opinion of the Court of Appeals. *Blonder-Tongue* involved the peculiarities of the U.S. patent law and applied collateral estoppel based on an earlier final judgment (see n. 16, *supra.*) finding the patent invalid. Petitioner will not discuss the case further in this petition, since the opinion of the Court of Appeals cites primarily to *Parklane Hosiery*.

which was affirmed on appeal. This Court held that Parklane's Seventh Amendment right to jury trial of the damage suit did not entitle Parklane to again litigate the issue concerning the proxy statement, even though the earlier judgment was in a "court tried" case. This Court noted, however, that the collateral estoppel doctrine should have no application where (439 U.S. at):

(330-331):

"* * * Allowing offensive collateral estoppel may also be unfair to a Defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the Defendant. Still another situation where it might be unfair to apply offensive estoppel

is where the second action affords the Defendant procedural opportunities unavailable in the first action that could readily cause a different result."

(332-333):

"* * * (T)here is no unfairness to the petitioners in applying offensive collateral estoppel in this case. First, in light of the serious allegations made in the SEC's complaint against the petitioners, as well as the foreseeability of subsequent private suits that typically follow a successful government judgment, the petitioners had every incentive to litigate the SEC lawsuit fully and vigorously. Second, the judgment in the SEC action was not inconsistent

with any previous decision.

* * * Since the
petitioners received a 'full and
fair' opportunity to litigate their
claims in the SEC action, the
contemporary law of collateral
estoppel leads inescapably to the
conclusion that the petitioners are
collaterally estopped from
relitigating the question of whether
the proxy statement was materially
false and misleading." (emphasis in
quotes, above, supplied)

We suggest the above italicized language
from the decision would prohibit use of
the doctrine to preclude one where the
very findings on which the doctrine is
based have been entered in violation of
the Seventh Amendment to the
Constitution, as here! This, because

such findings would be not only inconsistent with a previous judgment, but are subject to being vacated altogether under the mandate of *Lytle*, *supra*.

Further, we suggest that a finding of a "full and fair" opportunity to litigate is not here applicable as it was in *Parklane*. This, because a jury trial was not available for any of the fact finding functions required in the SEC action against *Parklane*. Not so here. The Court of Appeals, in giving the equitable findings in *Melody Perkins* Title VII claim against GM collateral estoppel effect in *Spivey*, on the basis that Plaintiff was given a "full and fair" opportunity to be heard, is an anathema to the constitutional right to jury trial declared by this Court in

Lytle, Beacon Theaters and Dairy Queen, all *supra*.

What the Court of Appeals holds, citing *Parklane*, is that the defendant in *Perkins v. Spivey* is entitled to use collateral estoppel to prevent litigation to a jury of issues against him based on facts that were found against Melody Perkins in *Perkins vs GM*, Title VII; yet GM is not entitled to the same collateral estoppel in *Perkins vs GM*, common law action. Anomalous is hardly sufficient to describe that result.

Moreover, in *Parklane* this Court holds that collateral estoppel may deprive one of Seventh Amendment rights in a subsequent *proceeding*, yet collateral estoppel cannot be used to defeat the right to jury trial in the *same* proceedings (i.e. the chancellor's

jurisdiction is secondary to the Seventh Amendment), *Lytle* at 1333. This is specifically recognized in *Parklane* where this Court observes (439 U.S. at 334):

"It is clear that the court in the *Beacon Theatres* case thought that if an issue common to both legal and equitable claims was first determined by a judge, relitigation of the issue before a jury might be foreclosed by *res judicata* or collateral estoppel. To avoid this result, the court held that when legal and equitable claims are joined in the same action, the trial judge has only limited discretion in determining the sequence of the trial and 'that discretion...must, wherever possible, be exercised to preserve jury trial.'"

Finally we suggest that *Parklane* only involves the Seventh Amendment as an *afterthought* by *Parklane*. This, since the first question in the later damage suit was: Are there any facts really left to determine? And, since the issue had already been determined against *Parklane* that the proxy statement was materially false and misleading, the only issue left for determination by a jury in the common law damage suit was injury and damages (439 U.S. n. 2 at 325); so, in *Parklane* there was no question about the judgment on which the collateral estoppel was based having been entered in violation of *Parklane's* Seventh Amendment right to trial by jury, or that a jury trial in those very same proceedings would in any way affect, overturn or contravene the earlier factual

determination on which the collateral estoppel was based. Not so here unless the Federal Constitutional command of the Seventh Amendment right to jury trial as applied in *Lytle*, *Curtis v Loether*, *Parklane Hosiery*, *Blonder-Tongue Lab*, *Beacon Theaters* and *Dairy Queen* be ignored, which is the result of the holding by the opinion of the Court of Appeals.

Conclusion

For the reasons aforesaid, petitioner prays the Court issue its Writ of Certiorari to the U. S. Court of Appeals for the Eighth Circuit, and on consideration of same that this Court Order that the Eighth Circuit amend it's Opinion and Mandate¹⁸ to grant the relief

¹⁸ In the detail as follows: that the Eighth Circuit alter or amend it's opinion, judgment and
(continued...)

required by the Seventh Amendment, as determined by this Court in its decisions in *Lytle*, *Curtis v. Loether*, *Parklane Hosiery*, *Beacon Theaters* and *Dairy Queen*.

¹⁸ (...continued)

mandate by ordering that the findings of fact by the District Court in the Title VII case of *Perkins v. G M* [Dist. Ct. No. 87-0048-W-9; Court of Appeals No. 89-2136WM], and the dismissal in *Perkins v. Thomas Spivey* [DC No. 88-0213-CV-W-5, Court of Appeals No. 89-1833WM] be held in abeyance pending resolution of *Perkins* common law claim against GM in *Perkins vs. GM* [Dist Ct. No 86-0665-CV-W-9, Appeal No. 89-2136WM] of the issue (Eighth Circuit Opinion appendix C-34):

" If the district court finds that a genuine issue as to material fact exists as to Perkins' allegations against GM concerning its negligent retention of Spivey, then Perkins must be given a jury trial."

and if such be determined in the affirmative, that the findings and judgment in *Perkins vs GM*, Title VII, and the judgment of dismissal in *Spivey*, both BE VACATED, and any determination thereafter be governed by resolution of the fact issues by a jury in *Perkins vs GM*, common law action, to be consolidated with *Perkins vs Spivey*; and that such consolidation be ordered considered by the District Court.

Respectfully submitted,



Gwen G. Caranchini*
3101 Broadway, Ste. 420
Kansas City, Missouri 64111
(816) 931-2800

and

Robert K. Ball II (on brief)
1125 Grand Avenue, Suite 500
Kansas City, Missouri 64106
(816) 471-1060

Attorneys for Petitioner
Melody E. Perkins

*Application to the Bar pending



APPENDIX A

Order Denying Appellant's Petition
for Rehearing and Suggestions for
Rehearing En Banc (Case Numbers:
89-1833/2136/2137 WM)

AMENDED ORDER SENT AUGUST 31, 1990
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MELODY PERKINS,

NO. 89-1833/

2136/2137WM

Appellant,

vs.

THOMAS S. SPIVEY,

Appellee.

MELODY PERKINS,

Appellant,

vs.

GENERAL MOTORS
CORPORATION OF
AMERICA,

Appellee.

ORDER
Filed August 29, 1990

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

Order Entered at the
Direction of the Court:

By: S/S

Robert D. St. Vrain
Clerk, U.S. Court of
Appeals, Eighth
Circuit

APPENDIX B

Order Denying Appellee's Petition for
Rehearing and Suggestion for Rehearing
En Banc (Case Numbers:
89-1833/2136/2137 WM)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MELODY PERKINS,

No. 89-1833/

2136/2137WM

Appellant,

vs.

THOMAS S. SPIVEY,

Appellee.

MELODY PERKINS,

Appellant,

vs.

GENERAL MOTORS CORPORATION
OF AMERICA,

Appellee.

ORDER

Filed August 29, 1990

Appellee General Motors Corporation's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is

also denied.

Order Entered at the
Direction of the Court:

By: S/S
Robert D. St. Vrain
Clerk, U. S. Court of
Appeals, Eighth Circuit

APPENDIX C

Order Affirming Findings, Facts and
Conclusions of Law in Title VII
Case; Affirming Summary
Judgment in Separate Action
Against Spivey, and Remanding
Negligence claim against GM for
July Trial (Case Numbers:
89-1833/2136/2137WM)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MELODY PERKINS,

No.89-1833WM

Appellant,

vs.

THOMAS S. SPIVEY,

Appellee.

MELODY PERKINS,

No.89-2136WM

vs.

GENERAL MOTORS CORPORATION
OF AMERICA,

Appellee.

MELODY PERKINS,

No. 89-2136WM

Appellant,

vs.

GENERAL MOTORS CORPORATION
OF AMERICA,

Appellee.

MELODY PERKINS,

No. 89-2137WM

Appellee,

vs.

THOMAS S. SPIVEY,

Appellant.

ORDER Filed July 24, 1990

Before: JOHN R. GIBSON and MAGILL, Circuit Judges, and DUMBAULD,* Senior District Judge.

MAGILL, Circuit Judge.

In these consolidated appeals, Melody Perkins¹ challenges two orders of Judge Bartlett¹ and one order of Chief Judge

* THE HONORABLE EDWARD DUMBAULD, Senior United States District Judge for the Western District of Pennsylvania, sitting by designation.

¹The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

Wright.² First, Perkins appeals Judge Bartlett's entry of summary judgment in favor of her employer, General Motors (GM), on her claim that GM breached its duty under Kansas common law to maintain a workplace free from sexual harassment. She alleges that GM negligently hired and retained employees, including a superintendent, who physically and/or psychologically assaulted her over a period of several years.³ On appeal, she argues that Judge Bartlett erred (1) in finding that GM owed no common law duty to prevent sexual harassment in the workplace, and (2) in alternatively finding that she assumed the risk of harm. We affirm Judge Bartlett's entry of summary judgment to the

²The Honorable Scott O. Wright, Chief Judge, United States District Court for the Western District of Missouri.

³Perkins v. General Motors, Nos. 86-0665-CV-W-9, 87-0048-CV-W-9, slip op. at 1-2 (W.D. Mo. Oct. 11, 1988) (order dismissing case No. 86-0665).

extent that he found Kansas common law does not impose a duty on GM to provide a workplace free from the purely psychological harms of sexual harassment. However, we reverse the entry of summary judgment in favor of GM insofar as Perkins alleges that her emotional harm was accompanied by or resulted in physical injuries, and remand for further proceedings consistent with this opinion.

Second, Perkins appeals Judge Bartlett's entry of judgment following a thirty-day bench trial on her claim that GM violated Title VII. At the conclusion of the trial, Judge Bartlett rejected as not credible her allegations of sexual assault and harassment. Three months later he issued his formal findings of fact and conclusions of law. On appeal, Perkins argues that Judge Bartlett erred when he denied her motion for recusal, which she filed nearly three months after the

conclusion of the bench trial. Because we find that Judge Bartlett did not abuse his discretion when he denied her motion to recuse, we affirm his entry of judgment in favor of GM on Perkins' Title VII claim.

Perkins also appeals Chief Judge Wright's entry of summary judgment in favor of GM superintendent, Thomas Spivey, on her claim that Spivey was liable for battery, assault and intentional infliction of emotional distress. In granting Spivey's motion for summary judgment, Chief Judge Wright found that because of Judge Bartlett's factual findings, Perkins was collaterally estopped litigating whether Spivey had psychologically and physically attacked her. On Appeal, Perkins argues that Chief Judge Wright erred in granting summary judgment in favor of Spivey on collateral estoppel grounds, and in so doing, denied her right to a jury trial on her claim against Spivey. We affirm.

Finally, in his cross-appeal, Spivey argues that Chief Judge Wright erred when he refused to impose sanctions against Perkins and her attorney. We affirm.

I.

On July 24, 1978, GM hired Perkins as a sixth-level production supervisor in the body shop of its plant in Kansas City, Kansas. With a few exceptions,⁴ her employment at this plant continued uninterrupted until January 1986 when she filed a charge with the Equal Employment Opportunity Commission

⁴Perkins' employment was interrupted for periods of training, layoff, transfer, special assignment and disability. For example, on May 1, 1980, GM laid off Perkins. Several months later, she was hired at GM's plant in Bowling Green, Kentucky. She worked at this plant until laid off on February 28, 1982. Shortly before her layoff, Perkins and Spivey discussed the possibility of her returning to the Kansas City plant. In fact, Perkins initiated some of these discussions. With Perkins' encouragement, Spivey helped her return to the plant, effective May 10, 1982.

(EEOC) and a claim for workers' compensation. Perkins alleged that while employed at the plant, she was subjected to sexual harassment. She testified that several GM employees told sexual jokes, and directed leering gestures and catcalls toward her and other women. She testified that despite her complaints, lodged early in her employment at the plant, the harassment grew worse and she gradually became immune to the conduct.

Perkins further alleged that Spivey, superintendent of the body shop and/or acting general superintendent at the plant, raped her at least twice a month during much of the time she worked at the plant. The alleged rapes occurred at places other than the plant. She maintains that Spivey accomplished these rapes by threatening her with death or termination of employment and, on several occasions, by brandishing a knife or gun at her.

Perkins filed three separate suits. In the first suit, filed in federal court on May 27, 1986, she alleged that GM breached its Kansas common law duty to maintain a safe workplace free from sexual harassment by negligently hiring and retaining various employees whom GM knew or should have known would physically and/or psychologically injure her. After receiving her notice of right to sue from the EEOC, Perkins filed her second suit in federal court on May 29, 1986, alleging that GM had violated Title VII. Shortly thereafter, however, the negligence and Title VII claims were consolidated for discovery and trial. On October 28, 1988, Judge Bartlett granted GM's motion for summary judgment on Perkins' negligence claim, finding that no duty existed under Kansas common law for employers to provide a workplace free from sexual harassment. In the alternative, Judge Bartlett found that even

if such a duty did exist, Perkins had assumed the risk of harm through her conduct.

The bench trial on Perkins' Title VII claim commenced on November 1, 1988. Three weeks later, Judge Bartlett informed the parties that his law clerk had just accepted employment to commence at the conclusion of her clerkship with a law firm occasionally retained by GM, but not involved in the case. Although Judge Bartlett offered to remove his law clerk from the case, counsel for both parties stated they had no objection to her continued participation.

On January 11, 1989, after a thirty-day bench trial, Judge Bartlett ruled in favor of GM on Perkins' Title VII claim. Formal entry of judgment was deferred pending consideration of proposed findings of fact and conclusions of law, which were ultimately issued on April 10, 1989. Judge Bartlett rejected as not credible Perkins' claims of

sexual harassment and assault by Spivey and other employees. He also found that Perkins participated in a consensual relationship with Spivey in the hope of advancing her career and that her allegations of threats and violence were the result of a fertile and twisted imagination. He also found Perkins' allegation that the plant environment was sexually hostile to be more creative than factual. He found that she not only generally encouraged and welcomed such conduct but was an active and encouraging participant in the sexually explicit conversations. On the few occasions when Perkins did lodge a complaint, either the conduct ceased immediately or GM dealt with it appropriately. Perkins v. General Motors, No. 87-0048-CV-W-9, slip op. at 1-25 (W.D. Mo. Apr. 10, 1989) (findings of fact, conclusions of law and order granting judgment for GM). Perkins does not challenge these factual findings on appeal as clearly

erroneous.

On February 9, 1989, nearly one month after the bench ruling, partners in the firm of Gage & Tucker, which represented GM in the Title VII action and partners in the firm of Lathrop, Koontz & Norquist, were informed for the first time that their management committees were engaged in preliminary discussions concerning the possibility of a merger between the firms.⁵ Judge Bartlett's wife, a labor attorney, was a partner in the firm of Lathrop, Koontz & Norquist. On April 3, 1989, Perkins filed a motion requesting Judge Bartlett recuse himself on three grounds: (1) the preliminary merger discussions between his wife's firm and Gage & Tucker; (2) the future employment of his law clerk with a firm which occasionally-

⁵No formal or informal agreement to merge was ever concluded and after the filing of this appeal, the law firms terminated negotiations.

represents GM; and (3) his wife's position as a labor attorney. In rejecting Perkins' motion for recusal, Judge Bartlett found in part that her motion "was a last ditch, desperate attempt to delay the issuance of findings and conclusions in [the Title VII] case until after [Perkins'] case against Thomas Spivey [could] be tried in another division of this court." Perkins v. General Motors, No. 87-0048-CV-W-9, slip op. at 4 (W.D. Mo. Apr. 10, 1989) (order denying Perkins' motion to recuse).

In that case, filed originally in Missouri state court on May 29, 1986, Perkins alleged that Spivey assaulted, battered, and engaged in outrageous conduct against her. GM and Perkins conducted an extensive amount of discovery on her two claims against GM throughout most of 1987. With only a few exceptions, the depositions were not cross-noticed in the state and federal actions, and

Spivey's counsel did not attend depositions in the federal case against GM. Furthermore, Perkins sought and obtained a protective order from the Missouri state court restricting Spivey from disclosing her medical and psychiatric records to GM, in order to prevent GM from using them against her in either the Title VII or negligence actions. Perkins' counsel subsequently wrote a letter to counsel for Spivey and GM warning them that violation of the state court order restricting disclosure of Perkins' medical records would force her to take strong steps. Finally, on numerous occasions, Perkins stated that no new parties would be added in the federal case against GM.

On November 27, 1987, Perkins moved to join her claim against Spivey with the negligence and Title VII claims asserted against GM which were pending in federal court. Judge Bartlett denied her motion

citing undue delay and prejudice to GM and Spivey. He then ordered that no further discovery be allowed without leave of court on her claims against GM, finding that the amount of discovery was out of proportion to the claims asserted in the case.

On March 10, 1988, after successfully moving to dismiss her state court action against Spivey without prejudice, Perkins refiled her claim against Spivey in federal court. On April 10, 1989, Judge Bartlett issued his formal findings of fact in the Title VII action. On April 19, 1989, Chief Judge Wright granted Spivey's motion for summary judgment on the basis of the collateral estoppel effect of Judge Bartlett's findings. Perkins v. Spivey, No. 83-0213-CV-W-5 (W.D. Mo. Apr. 19, 1989).

II.

In order to best resolve the numerous issues raised by Perkins, we will first

examine whether Judge Bartlett properly granted GM's motion for summary judgment on Perkins' common law claim of negligence. Second, we will determine whether Judge Bartlett committed reversible error during the course of the Title VII suit against GM when he refused to recuse himself.⁶ Third, we will examine whether Judge Bartlett abused his discretion in refusing to grant Perkins

⁶Perkins argues not only that we should reverse the judgment entered because Judge Bartlett refused to recuse himself, but that his refusal to do so infringed her seventh amendment right to a jury trial on her claims against Spivey. She argues that if Judge Bartlett had recused himself, his formal findings of fact and conclusions of law would never have been issued. Therefore, Chief Judge Wright would not have entered summary judgment on the basis of collateral estoppel and she would have received a jury trial on her claims against Spivey. Because we hold that Judge Bartlett did not abuse his discretion when he denied Perkins' motion to recuse, we need not reach her seventh amendment argument. It is well settled that an otherwise proper ruling is not erroneous merely because it has the incidental effect of precluding a jury trial. See, e.g., Fidelity & Deposit Co. of Md. v. United States, 187 U.S. 315, 319-21 (1902) (summary judgment does not violate seventh amendment).

motion for leave to join her action against Spivey to her GM claims.⁷ Finally, we will examine Spivey's claim that Chief Judge Wright erred when he refused to impose sanctions on Perkins and her Attorney.

A.

Perkins first argues that Judge Bartlett

⁷Perkins argues that the effect of Judge Bartlett's refusal to grant her motion for leave to join her action against Spivey to her claims against GM was to violate her seventh amendment right to a jury trial. She argues that if Spivey had been joined, her claims would have presented mixed legal and equitable issues. As a result, Perkins would have received a jury trial on her legal claim against Spivey before a bench trial on her Title VII claims against GM. Her seventh amendment argument therefore hinges on whether Judge Bartlett abused his discretion when he refused to grant Perkins' motion for leave to join her action against Spivey to her claims against GM. Because we hold that Judge Bartlett did not abuse his discretion, Perkins' claims against Spivey and GM properly remained independent causes of action. Therefore, under Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979), discussed infra at 22-23, Chief Judge Wright's entry of summary judgment on the basis of collateral estoppel was proper and did not violate Perkins' seventh amendment right to a jury trial on her legal claim against Spivey.

erred when he granted GM's motion for summary judgment on her negligence claim. In granting summary judgment, Judge Bartlett found that no duty exists under Kansas common law which requires GM to provide a workplace free of sexually offensive conduct. In the alternative, he held that even if such a duty exists, Perkins assumed the risk as a matter of law because she voluntarily returned to the Kansas plant in 1982 with the full knowledge of the alleged sexual harassment.

Our review of a grant of summary judgment is governed by the same standard used by the court below. The entry of summary judgment is appropriate only when there is no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Kegel v. Runnels, 793 F. 2d 924, 926 (8th Cir. 1986). In reviewing the validity of Judge Bartlett's decision to grant GM's motion for summary judgment, we

review the facts and the inferences reasonably drawn therefrom in the light most favorable to Perkins. Id.

GM first argues that an employer has no duty under Kansas common law to provide a workplace free from sexual harassment. We agree, but only in part. In EEOC v. General Motors Corp., 713 F. Supp. 1394 (D. Kan. 1989), the court confronted one of the issues raised by Perkins. The plaintiff-employee brought suit against GM alleging negligence and intentional infliction of emotional distress stemming from a coemployee's alleged sexual harassment. The employee argued that GM breached its common law duty to provide a workplace "free of sexual assault, harassment, intimidations and advances of a verbal and physical nature." Id. at 1396. The district court, in a well-reasoned opinion, held that Kansas common law does not impose upon an employer a duty to provide a

workplace free from sexual harassment. Id.

We defer to the state law rulings of federal district courts which sit in the state whose law is controlling. We may refuse to follow the federal district court ruling only if we find that it is "'fundamentally deficient in analysis, without a reasonable basis, or contrary to reported state-court opinion.'" Pony Exp. Cab & Bus., Inc. v. Ward, 841 F.2d 207, 209 (8th Cir. 1988) (per curiam) (quoting Economy Fire & Cas. Co. v. Tri-State Ins. Co., 827 F.2d 373, 375 (8th Cir. 1987)). Because we do not find any of these conditions to exist, we adopt the Kansas district court's holding that Kansas common law does not impose a duty on its employers to provide a workplace free from sexual harassment.⁸ In so doing, we note that we are obliged to apply, not amend, existing

⁸We note that Perkins' counsel does not attack, nor even discuss, the district court's holding in EEOC v. General Motors.

state law. Tidler v. Eli Lilly & Co., 851 F2d 418, 426 (D.C. Cir. 1988).

However, as counsel for GM admitted in oral argument and as the court in EEOC v. General Motors explicitly noted, the lack of a Kansas common law duty to provide a workplace free from sexual harassment was based upon the district court's conclusion that the only injuries alleged were psychological, and not physical, in nature. EEOC v. General Motors, 713 F. Supp. at 1396 (citing Hoard v. Shawnee Mission Medical Ctr., 662 P.2d 1213, 1219-20 (Kan. 1983)). The Kansas federal district court explained:

It appears from the relevant case law that the traditional application of the employer's common law duty to provide a safe work place was intended to protect employees from unsafe work places where they could suffer physical injury. At common law, the employer had a limited tort liability to its employees. Kansas case law exhibits a general concern for the physical safety of employees. [Plaintiff's] alleged injuries here were purely psychological. Generally, Kansas law

does not allow recovery for emotional distress caused by negligence absent some bodily injury. Hoard v. Shawnee Mission Medical Center, 233 Kan. 267, 274, 662 P.2d 1214, 1219-20 (1983) (Kansas does not recognize the tort of negligent infliction of emotional distress absent bodily injury). This court is not at liberty to arbitrarily expand the common law of this state beyond those boundaries set by the Kansas Supreme Court. Since no authority exists to establish a cause of action for failure to provide a safe work place arising out of incidents of sexual harassment on the job, the court has no choice but to grant summary judgment in favor of GM on count III of [plaintiff's] complaint.

Id. (emphasis added) (citations omitted). Therefore, while GM does not have a duty under Kansas common law to maintain a workplace free from the psychological harm of sexual harassment, it does have a duty not to retain a superintendent it knows or should have known is emotionally harming his coemployees in such a manner that they suffer physical injuries. See id.; Hoard, 662 P.2d at 1219-20, 1223; Plains Resources Inc. v. Gable, 682 P.2d 653, 663, 665 (Kan. 1984).

Perkins' claims against GM based upon the sexual harassment within the plant do not state a cause of action under Kansas common law. As Perkins concedes, the harassment was "offensive, bothersome, embarrassing, disgusting, shocking and infuriating . . . [but she eventually became] immune" to the conduct. Such harms are purely psychological in nature and, therefore, Judge Bartlett properly granted GM's motion for summary judgment based on these claims.

However, Perkins also argues that she suffered both purely physical harm and emotional harm accompanied by physical injuries, when Spivey, taking advantage of his position as superintendent, raped her repeatedly over a period of several years. Perkins alleges that Spivey threatened her with termination, physical harm, and death if she did not submit. She claims that GM, through its managers, knew or should have

known that Spivey was subjecting her to repeated rapes throughout the course of her employment with GM. She maintains GM was negligent because the company, despite its actual or constructive knowledge, continued to employ Spivey and failed to take any action against him, thereby subjecting her to his continued attacks. To this extent, Perkins' negligence claim is based upon both emotional harms, which are accompanied by or result in immediate physical injuries, and physical injury alone. Therefore, insofar as her claim was so based, the entry of summary judgment in favor of GM was improper. A cause of action does exist under Kansas common law when employers negligently hire or retain employees they know or should know are incompetent or dangerous when another employee is physically injured by the dangerous employee or is emotionally harmed such that immediate physical injury is the

result. See Plains Resources, Inc., 682 P.2d at 665 (citing Restatement (Second) of Torts section 909, comment b (1977)).

Because a duty does exist under Kansas common law, we must examine GM's argument that Perkins assumed the risk of physical harm by voluntarily returning to the Kansas City plant to continue her work. GM relies on the Kansas Supreme Court decision in Gabbard v. Sharp, 205 P.2d 960 (Kan. 1949), to support its position that Perkins assumed this risk. In Gabbard, the plaintiff-employee, a waitress, was assaulted by a fellow employee who was alleged to be drunk and upset about his thwarted advances toward her. In her suit, the waitress also alleged that the employer knew of her assailant's disposition toward her and other women and his habits in and about the premises during the hours that she worked. She claimed that the employer owed her a duty to provide a

safe workplace, which it neglected, thereby causing and contributing to her injuries. The Kansas Supreme Court held in part that because the waitress knew of her coemployee's propensity for violence, she assumed the risk of harm. Id. at 964.

After a thorough review of Kansas law, we have found that this decision, published forty-one years ago, no longer represents, in significant part, the common law of Kansas. First, we note that Gabbard has not been cited favorably in thirty-three years. See, e.g., Murray v. Modoc State Bank, 313 P.2d 304, 311 (Kan. 1957). Given the tremendous social changes since 1957 in the evolution of society's attitudes towards women and abuse, it is difficult to believe Kansas courts would continue to hold to such archaic views. See, e.g., Kan. Stat. Ann. section 44-1001, et. seq. (Kansas Acts Against Discrimination). More importantly, however, two recent Kansas Supreme Court cases

directly conflict with the underlying holdings of Gabbard.

First, the Gabbard court stated that the waitress did not state a cause of action. The waitress claimed that because her employer negligently retained a coemployee known to have a vicious disposition, her employer was liable for injuries she suffered when her coemployee assaulted her. The reasoning behind the court's conclusion is that an assault is an intentional act which is not committed within the scope of one's employment. Gabbard, 205 P.2d at 963-64. The idea that an employer is not directly liable for negligently retaining an employee who assaults another person because an assault is not within the scope of employment has since been emphatically rejected in Kansas. In Plains Resources, Inc. the Kansas Supreme Court stated:

The negligent hiring and/or retention doctrine recognizes that an

- employer has a duty to use reasonable care in the selection and retention of employees. This duty requires that an employer hire and retain only safe and competent employees. An employer breaches this duty when it hires or retains employees that it knows or should know are incompetent. Liability exists under either of these doctrines relating to negligent hiring or retention despite the fact that the direct cause of injury to the injured person is the negligent or intentional acts of an employee acting outside the scope of his employment.

Plains Resources, Inc., 682 P.2d at 662
(emphasis added) (citation omitted)
(distinguishing cause of action stemming from indirect liability, respondeat superior, and direct liability, negligent hiring and retention of incompetent employee; "[i]n a respondeat superior action, it must be proved that the employee was acting within the course and scope of his employment and that he was negligent, which negligence was the proximate cause of the plaintiff's injuries. In a negligent hiring action, there is no need to prove that the employee's act was

committed within the course and scope of employment.'"') (quoting 2 Am. Jur. Proof of Facts 2d, Negligent Hiring section 3, p. 616); compare id. (employer directly liable for employees' assaults under doctrine of negligent hiring and retention) with Williams v. Community Drive-in Theatre, Inc., 520 P.2d 1296, 1301-02 (Kan. 1974) (employer not liable under doctrine of respondeat superior for employee's assault when not committed in furtherance of employer's interest). Therefore, one of the primary rationales underlying Gabbard has since been rejected by the Kansas Supreme Court.⁹

Second, the Gabbard court stated that if

⁹The fact that the injured party in Plains Resources, Inc. was not another employee is irrelevant. The common law doctrine as developed in Kansas focuses on the direct liability of the employer for its negligence in hiring and retaining an unfit employee who harms another person. We find no case in which the identity of the person harmed is important. See generally Plains Resources, Inc., 682 P.2d at 661-667.

"an employee knows that another employee is incompetent, or habitually negligent, and continues his work without objection, and without being induced by his employer to believe that a change will be made or that his employment will be made less dangerous he assumes the risk and hazards, of which he has full and complete knowledge, incident to such employment." Gabbard, 205 P.2d at 964. Although we have no quarrel generally with the continued validity of this common law rule, we note that its application to the facts of Gabbard, which involved an intentional criminal act against a coemployee, does not survive in Kansas.

Under Kansas common law, the assumption of the risk doctrine is based upon a theory of implied contract whereby an employee impliedly contracts to assume both the ordinary and at times the extraordinary risks of employment. In Jackson v. City of Kansas City, 680 P.2d 877 (Kan. 1984), the Kansas

Supreme Court stated that:

'The doctrine of assumption of risk is still viable in Kansas though its application is limited to cases . . . where a master-servant relationship is involved. . . .

Assumption of risk, in the law of master and servant, is a phrase commonly used to describe a term or condition in the contract of employment, either express or implied from the circumstances of the employment, by which the employee agrees that certain dangers of injury, while he is engaged in the service for which he is hired, shall be at the risk of the employee. Assumption of risk generally bars recovery by an employee who knows of the danger in a situation but nevertheless voluntarily exposes himself to that danger. . . .

[A]ssumption of risk arises through implied contract of assuming the risk of a known danger; the essence of it is venturousness; it implies intentional exposure to a known danger; it embraces a mental state of willingness; . . . it defeats recovery because it is a previous abandonment of the right to complain if an accident occurs.'

Id. at 897 (citations omitted) (quoting Borth v. Borth, 561 P.2d 408, 412-13 (Kan. 1977)); see also id. at 891 ("reduced to its last analysis, the doctrine of assumed risk must

rest for its support upon the express or implied agreement of the employe [sic] that, knowing the danger to which he is exposed, he agrees to assume all responsibility for resulting injury'" (quoting Blackmore v. Auer, 357 P.2d 765, 773 (Kan. 1960)).

Despite the fact that the doctrine is based upon contract principles, GM asks us to find that under Kansas common law, Perkins assumed the risk of harm by entering into an implied contract under which she assumed the risk of an illegal act, namely rape. Given the state's strong policy against such violent acts, see Kan. Stat. Ann. Sections 21-3301, 21-3502, we do not believe Kansas courts would sanction a contract, whether implied or express, with such an illegal subject matter. See, e.g., Southern American Ins. v. Gabbert-Jones, Inc., 769 P.2d 1194, 1198 (Kan. App. 1989); cf. Wagstaff v. Peters, 453 P.2d 120, 126 (Kan. 1969)

(because contract never challenged as illegal, agreement valid). Therefore, we hold that Perkins did not, and could not, assume the risk of rape whatever her knowledge of the risk.

We conclude that while summary judgment was properly granted as to Perkins' claim that GM breached its common law duty to provide a workplace free from sexual harassment, it was not properly granted as to Perkins' claim that GM breached its common law duty by retaining Spivey. In Lytle v. Household Mfg., Inc., 110 S. Ct. 1331 (1990), the Supreme Court refused "to accord collateral estoppel effect to a district court's determinations of issues common to equitable and legal claims where the court resolved the equitable claims first solely because it erroneously dismissed the legal claims." Id. at 1338. Any other result, the Court explained, would infringe the plaintiff's seventh amendment right to a

jury trial. Id. Perkins' claims against GM under Kansas common law and Title VII were consolidated for discovery and trial, and as such were pursued in the same action. Therefore, because the entry of summary judgment on behalf of GM was partially in error, Perkins is entitled to a jury trial on her erroneously dismissed claim notwithstanding the intervening bench trial on her equitable claim under Title VII.¹⁰ As a result, we must remand to the district court for proceedings consistent with this

¹⁰GM argues that we cannot allow Perkins to raise a violation of her seventh amendment jury right on appeal because she pursued a trial strategy whereby she attempted, although unsuccessfully, to waive her right to a jury trial. We reject GM's argument. First, it was GM who prevented Perkins from waiving her right to a jury trial by objecting to Perkins' attempted waiver. To that extent, GM pursued a trial strategy of seeking a jury trial. Under GM's own argument, it should not be allowed to complain because it will now get exactly what it has originally sought, a jury trial by objecting to Perkins' attempted waiver. Second, Perkins correctly claims and GM admits that the waiver of her jury trial right was never accepted. Therefore, it was not effectively waived.

opinion. If the district court finds that a genuine issue as to material fact exists as to Perkins' allegations against GM concerning its negligent retention of Spivey, then Perkins must be given a jury trial.

B.

Perkins next argues that Judge Bartlett erred when he refused to recuse himself because (1) his law clerk who assisted in the case had accepted employment to commence at the conclusion of her clerkship with a law firm occasionally retained by GM but not involved in the Title VII case; (2) his wife specializes in labor law practice and attended portions of the trial; and (3) rumors surfaced nearly one month after the bench ruling that indicated the firm at which Judge Bartlett's wife was a partner was engaged in preliminary merger discussions with the firm representing GM in this case.

We review Judge Bartlett's decision

declining to recuse himself only for abuse of discretion. Gray v. University of Arkansas, 883 F.2d 1394, 1398 (8th Cir. 1989). Disqualification is appropriate only if the facts would provide an objective, knowledgeable member of the public with a reasonable basis for doubting a judge's impartiality. United States v. DeLuna, 763 F.2d 897, 907 (8th Cir.), cert. denied sub nom. Thomas v. United States. 474 U.S. 980 (1985). However, any grounds for recusal must be asserted promptly. Oglala Sioux Tribe v. Homestate Min. Co., 722 F.2d 1407, 1414 (8th Cir. 1983). Perkins does not once argue that Judge Bartlett abused his discretion. She appears to urge upon us a de novo standard of review, forgetting that our inquiry is not merely whether we would have made the same decision as Judge Bartlett, but whether we believe that he abused his discretion.

We cannot say that Judge Bartlett abused

his discretion based upon the record in this case. First, on November 21, 1988, Judge Bartlett disclosed to counsel for Perkins and GM that his law clerk had accepted an offer of employment with a law firm which occasionally represented GM. The judge asked both parties if they had any concerns about her continued participation in the case. Perkins responded, "No sir, I don't," and her counsel stated, "None whatsoever, Your Honor." Grounds for disqualification under 28 U.S.C. section 455(a) may be waived after "full disclosure on the record." By electing to proceed and failing to seek Judge Bartlett's recusal, Perkins waived any such claim she might have had regarding the law clerk's future employment.

Second, Perkins' claim that Judge Bartlett should have recused himself because his wife was an attorney specializing in labor law and management is not only legally

insufficient, but it was not asserted in a timely fashion. Merely because his wife is a labor attorney does not mean that Judge Bartlett must recuse himself from all labor cases. Otherwise, every judge married to an attorney would be forced to recuse himself or herself from every case involving matters in which the spouse specializes. In fact, a judge whose spouse is a general practitioner would have to recuse himself or herself in almost every case.

Furthermore, Judge Bartlett had been assigned to the Title VII case for over two years prior to Perkins' motion for recusal. During the interim, discovery had taken place, the pretrial orders had been issued, the negligence claim dismissed and a thirty-day bench trial held. If Perkins had wanted to seek Judge Bartlett's recusal on the basis of his wife's position as an attorney specializing in labor law, she should have

/

asserted it before such a great expenditure of resources. Therefore, her motion was not asserted promptly. See Oglala Sioux Tribe, 722 F.2d at 1414.

Third, Judge Bartlett did not abuse his discretion when he refused to recuse himself on the basis of the preliminary merger discussions underway between the firm representing GM and the firm in which his wife was a partner. The discussions were merely preliminary. Therefore, his wife did not have a reasonable future interest in the firm representing GM. Second, the merger discussions did not begin and the judge and his wife did not learn about them until approximately one month after the judge had already ruled against Perkins. To that extent, there could be no conflict. Although the precise wording of the factual findings and conclusions of law had not yet been determined, Perkins had already lost and GM

had won. The parties with the most significant interest in the precise wording of the findings were Perkins and Spivey because of the possible collateral estoppel effect on Perkins' subsequent claim against Spivey. Spivey was not represented by GM's law firm, Gage & Tucker.

Perkins also argues that Judge Bartlett should have recused himself because his wife was present in the courtroom on several occasions. The mere presence of his wife in the courtroom has no independent significance. Perkins' argument regarding the wife's presence is only relevant in the context of the merger and the specialization arguments. Because, as we have found, Judge Bartlett did not abuse his discretion in refusing to recuse himself because of his wife's labor and management specialization, he could not have abused his discretion merely because his wife observed some of the

testimony in open court.¹¹ Furthermore, at the time his wife attended small portions of the trial, her firm had not even begun preliminary negotiations with Gage & Tucker. The announcement of the talks were made over one month later. Therefore, there could not have been a connection between her attendance and the discussions.

C.

Perkins further argues that Chief Judge Wright's failure to join her legal claim against Spivey to her mixed legal and equitable claims against GM violated her right to a jury trial, because if they had

¹¹Perkins' claim that Judge Bartlett schemed to subvert her claim against Spivey by refusing to recuse himself is frivolous and without any basis whatsoever. In fact, if anyone schemed, it was Perkins' counsel whose apparent motivation behind filing the motion to recuse was to delay Judge Bartlett's completion of the findings of fact until after Perkins' jury trial against Spivey. Perkins v. General Motors, No. 87-0048-CV-W-9, slip op. at 4 (W.D. Mo. Ap. 10, 1989) (order denying Perkins' motion for recusal).

been joined, the seventh amendment would have required that she receive a jury trial on her legal claims. The cases Perkins cites in support of her seventh amendment argument hold that where a single action involves both legal and equitable claims, the court must conduct a jury trial of the legal claims first. See Beacon Theatres, Inc. v. Westover, 359 U. S. 500 (1959); Dairy Queen, Inc. v. Wood, 369 U. S. 469 (1962); Meeker v. Am. Ambassador Oil Corp., 375 U. S. 160 (1963) (per curiam). These cases are inapposite because Perkins' legal claim against Spivey was not joined in the same action with her equitable claim against GM. Because Perkins' seventh amendment claim hinges on whether Judge Bartlett abused his discretion when he refused to grant her motion for joinder, the claim necessarily fails unless we find Judge Bartlett in fact abused his discretion. See infra text at 21-23.

We review the district court's decision to grant or deny leave to amend for abuse of discretion. See Thompson-El v. Jones, 876 F.2d 66, 67 (8th Cir. 1989). Leave to amend can be properly denied for several reasons, such as undue delay, bad faith or dilatory motive by the movant, undue prejudice to the opposing party, and futility of amendment. Id. Despite her allegations of error, Perkins does not even allege that Judge Bartlett abused his discretion. After a thorough review of the record, we hold that Judge Bartlett did not abuse his discretion when he refused to join Perkins' claim against Spivey to the same action with her claims against GM.

Perkins waited eighteen months after filing the federal and state cases before seeking leave to amend her complaint and join her claim against Spivey to her claims against GM. She finally admitted that her

effort to join Spivey was motivated solely by a last minute change in strategy. However, she did not originally inform Judge Bartlett of her true motivations because, as she subsequently informed him, she did not believe he would appreciate her candor.

In denying her motion to join Spivey, Judge Bartlett found: (1) in light of the extensive discovery already conducted, most of it without Spivey's participation, it would be "contrary to the overall purposes of the federal rules to promote efficiency and cost saving in litigation to permit amendments that appear to run a very real risk of extensive additional discovery;" (2) joinder and amendment would unduly prejudice both GM and Spivey at trial, where evidence admissible against only one defendant would be heard by a single jury deciding both cases (i.e., Spivey would be prejudiced by alleged misconduct of other GM employees and GM by

alleged threats and assaults not made on GM premises); and (3) because Perkins asserted no single claim against both GM and Spivey, there was a good chance that even if joinder were granted, separate trials would be ordered to avoid prejudice and confusion. Perkins v. Spivey, No. 88-0213-CV-W-5, slip op. at 5-6 (W.D. Mo. June 9, 1988). We cannot find based upon this record that Judge Bartlett abused his discretion when he refused to permit joinder. Therefore, Judge Bartlett's valid ruling does not become erroneous merely because it has the incidental effect of precluding a jury trial on Perkins' claim against Spivey. See Fidelity & Deposit Co., 187 U. S. at 319-21.

Because Judge Bartlett did not abuse his discretion, only two avenues are left to Perkins to challenge Chief Judge Wright's entry of summary judgment on her claim against Spivey. In examining these avenues,

the first issue we must resolve is whether, apart from Perkins' right to a jury trial under the seventh amendment, Spivey, who was not a party to the prior judgment, may nevertheless use that judgment defensively to prevent Perkins from relitigating issues in the subsequent suit which were resolved against her in the earlier proceeding. The Supreme Court in Blonder-Tongue Lab. Inc. v. University of Illinois Foundation, 402 U. S. 313 (1971), conclusively resolved this issue. The Court held that a party who had fully litigated a claim and lost in a prior action could be collaterally estopped from relitigating the same claim in a subsequent action against a different defendant unless the party did not have a full and fair opportunity to litigate her claim in the prior suit. Id. at 328-29. Not only did Perkins fully litigate her Title VII claim in front of Judge Bartlett, but Perkins conceded

during oral argument that the ensuing findings of fact resolved all relevant factual disputes in her claim against Spivey. Because Perkins had a full and fair opportunity to litigate her claims of harassment and assault in her Title VII suit, she is collaterally estopped from relitigating these fact issues in her subsequent action against Spivey. Id.; see also Parklane Hosiery Co., Inc. v. Shore, 439 U. S. 322, 329-33 (1979).

The issue which remains is whether the use of defensive collateral estoppel in this case violated Perkins' seventh amendment right to a jury trial. In Parklane, the Supreme Court stated:

The question that remains is whether, notwithstanding the law of collateral estoppel, the use of offensive collateral estoppel in this case would violate the petitioners' Seventh Amendment right to a jury trial.

'[T]he thrust of the [Seventh] Amendment was to preserve the right

to jury trial as it existed in 1791.' At common law, a litigant was not entitled to have a jury determine issues that had been previously adjudicated by a chancellor in equity.

. . . .

Thus if, as we have held, the law of collateral estoppel forecloses the petitioners from relitigating the factual issues determined against them in the [equitable] action, nothing in the Seventh Amendment dictates a different result [if the subsequent action is at law], even though because of lack of mutuality there would have been no collateral estoppel in 1791.

Id. at 333, 337 (citations omitted). Parklane is fatal to Perkins' argument. The seventh amendment is not violated although Chief Judge Wright's entry of summary judgment on collateral estoppel grounds foreclosed Perkins from relitigating factual issues determined against her in the prior equitable action.

Perkins attempts to distinguish Parklane in several ways. First, Perkins argues she had a procedural avenue (jury trial) in the

potential Spivey trial which was not available to her in the Title VII trial. This argument does no more than restate the issue and as such does not distinguish Parklane.

Second, Perkins argues that Parklane is inapposite because it involved the offensive use of collateral estoppel, while Spivey's case involved its defensive use. Her argument is without merit because the distinction is not relevant for purposes of her claim under the seventh amendment. The Court's holding in Parklane that the seventh amendment is not violated when a party is barred from relitigating the factual issues determined against it in a prior equitable action does not turn on whether collateral estoppel was used offensively or defensively. Because Judge Bartlett's ruling in the Title VII action was without error, his findings of fact preclude trial on Perkins' separate

intentional tort claim.¹²

D.

In his cross-appeal, Spivey argues that Chief Judge Wright erred when he refused to

¹²Perkins argues that Lytle v. Household Mfg., Inc., 110 S. Ct. 1331 (1990), requires a different result. We disagree. First, Lytle does not overrule Parklane but cites it favorably. See id. at 1334, 1336, 1337. Second, the holding of Lytle is limited to a case where the party brought both equitable and legal claims in the same action, but the district court erroneously dismissed the legal claim. Id. at 1334. In the case at bar, the legal and equitable claims were not brought in the same action and the district court properly refused to grant Perkins leave to join them. Therefore, Parklane controls, not Lytle.

Our affirmance of Chief Judge Wright's grant of Spivey's motion for summary judgment is based upon our finding that Chief Judge Wright properly relied upon Judge Bartlett's factual findings in the Title VII proceeding. Our affirmance should not be read as stating that we believe Judge Bartlett's findings were necessarily correct. We affirm on the basis of the procedural tool of collateral estoppel. Our partial reversal of Judge Bartlett's grant of GM's motion for summary judgment on Perkins' common law claims is based upon the seventh amendment. Our partial reversal should not be read as stating that we believe that Perkins' version of the facts was more credible.

impose sanctions on Perkins and her attorney. In support of his argument, Spivey points to the following: (1) Perkins' continued prosecution of the Spivey claim after Judge Bartlett ruled against her on January 11, 1989; (2) Perkins' continued prosecution of the case against Spivey after formal findings were issued; and (3) misleading statements made to Chief Judge Wright. We review the factual findings under the clearly erroneous standard and the court's legal conclusion that the rule was not violated de novo. EEOC v. Milavetz & Assocs., 863 F.2d 613, 614 (8th Cir. 1988).

28 U.S.C. section 1927 provides for the imposition of costs and attorney's fees against an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously." The standard under section 1927 and Rule 11 is whether the attorney's conduct "viewed objectively, manifests either -

intentional or reckless disregard of the attorney's duties to the court." Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987) (en banc).

In a well-reasoned opinion, Chief Judge Wright refused to impose sanctions, holding that: (1) he could not say that a reasonable attorney would conclude that Judge Bartlett's indication through his bench ruling of the probable final order to be issued, no matter the degree of certainty indicated, constituted final judgment for the purposes of collateral estoppel; (2) Perkins could not reasonably be expected at the January 11, 1989 hearing to hypothesize with absolute certainty the specific findings of April 10, 1989; and (3) he could not find that Perkins' actions between April 10, 1989 and April 19, 1989 were so unreasonable as to merit sanctions. After a thorough review of the record and the parties' arguments, we find no

error.

III.

In conclusion, we hold that Judge Bartlett properly granted GM's motion for summary judgment on Perkins' negligence claim based upon his finding that no duty exists under Kansas common law for an employer to provide a workplace free from sexual harassment. However, GM's motion for summary judgment was erroneously granted to the extent Perkins' negligent retention claim was based upon physical injury to Perkins and/or emotional harm accompanied by immediate physical injury. Therefore, we reverse on this one point alone, and remand for further proceedings consistent with this opinion. We further hold that Judge Bartlett did not abuse his discretion when he failed to recuse himself and when he denied Perkins' motion for leave to join her claim against Spivey to her claims against GM. Furthermore, we hold

that Chief Judge Wright properly granted Spivey's motion for summary judgment based on the collateral estoppel effect of the findings made in the prior Title VII bench trial. Perkins' seventh amendment, right to a jury trial on her legal claim against Spivey was not infringed. Finally, we hold that Chief Judge Wright properly denied Spivey's motion for sanctions.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX D

Order granting Defendant Spivey's
Motion for Summary Judgment
in Separate Action on Grounds
of Collateral Estoppel (Case No.
88-0213-CV-W-5)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MELODY E. PERKINS,

No. 88-0213-CV-W-5

Plaintiff,

vs.

THOMAS S. SPIVEY,

Defendant.

ORDER
Filed April 19, 1989

Pending before the Court are plaintiff's motion for summary judgment or partial summary judgment on defendant's counterclaim, defendant's motion for partial summary judgment on his counterclaim, and defendant's motion for summary judgment. For the following reasons, defendant's motion for summary judgment shall be granted and the two remaining motion for partial summary judgment shall be denied as moot.

Factual Background

In two separate complaints, plaintiff Perkins brought suit against defendant General Motors Corporation (GM) and defendant Thomas S. Spivey. Both complaints were filed in the Western District of Missouri, Western Division. Perkins v. GM, Case No. 87-0048-CV-W-9, was a Title VII employment discrimination alleging sexual harassment. This case went to trial before The Honorable D. Brook Bartlett on October 31, 1988. The non-jury trial lasted until January 11, 1989. On that day, Judge Bartlett announced from the bench his decision in favor of defendant GM. Written Findings of Fact and Conclusions of Law were filed by Judge Bartlett on April 10, 1989.

Now pending before this Court is plaintiff Perkins' complaint against defendant Thomas Spivey. This complaint sounds in tort, alleging in three counts (1)

assault, (2) battery, and (3) outrageous conduct. The question which this Court must now decide is whether, in light of the disposition of Perkins v. GM, collateral estoppel bars the plaintiff from pursuing her claim against defendant Spivey.

Collateral Estoppel

The doctrine of collateral estoppel provides that once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. Montana v. United States, 440 U. S. 147, 153, 99 S. Ct. 970, 973 (1979). The underlying purpose of collateral estoppel is to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Allen v. McCurry, 449 U. S.

90, 94, 101 S.Ct. 411, 415 (1980).

The Supreme Court has consistently reaffirmed the benefits of collateral estoppel by applying it in contexts not formerly recognized at common law. For example, the Court has eliminated the mutuality requirement by using it to bar relitigation of issues decided in earlier federal court suits, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434 (1971), and has allowed a litigant who was not a party to a federal case to use collateral estoppel "offensively" in a federal suit against the party who lost the first case, Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 99 S.Ct. 645 (1979). The current trend is to expand the preclusive effect of judgments. Blonder-Tongue, 402 U.S. at 326, 91 S.Ct. at 1441.

Analysis

After carefully reviewing the law on this issue, it is the conclusion of the Court that Parklane Hosiery Co., Inc. v. Shore, 439 U. S. 322, 99 S.Ct. 645, is dispositive as to the case at bar. The issue here, as in Parklane Hosiery, is whether a prior adjudication in a court-tried proceeding may be used to preclude fact issues from subsequent adjudication in a case where the party precluded has a right to trial by jury in the second action. In deciding that issue, the Parklane Hosiery Court held that:

Despite the strong support to be found both in history and in recent decisional law of this Court for the proposition that an equitable determination can have collateral-estoppel effect in a subsequent legal action, the petitioners argue that application of collateral estoppel in this case would nevertheless violate their Seventh Amendment rights to a jury trial. . . .

The petitioners have advanced no persuasive reason, however, why the meaning of the Seventh Amendment should depend on whether or not

mutuality of the parties is present. A litigant who has lost because of adverse factual findings in an equity action is equally deprived of a jury trial whether he is estopped from relitigating the factual issues against the same party or a new party. In either case, the party against whom estoppel is asserted has litigated questions of fact, and has had the facts determined against him in an earlier proceeding. In either case there is no further fact-finding function for the jury to perform, since the common factual issue has been resolved in the previous action.

Id. at 335-36, 99 S.Ct. at 653-54.

In Parklane Hosiery, the Court held that factual determinations made by a court in an earlier-tried action prosecuted by the S.E.C. precluded litigation of the fact issue of whether the proxy statement at issue was false and misleading. The collateral estoppel issue arose in the context of a parallel stockholders' suit which came to trial later. The Supreme Court held that, notwithstanding the right to trial by jury in the second action, the factual determinations made by the Court in the bench trial

collaterally estopped a retrial of the issues.

The plaintiff argues that the Court should apply the principles of Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894 (1962) and Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948 (1959). These cases are inapplicable to the case at bar, however, because they only govern cases where legal and equitable claims are joined (1) in the same action, and (2) against the same defendant. These requirements are not met in this case. Moreover, the Supreme Court considered, and expressly rejected, the notion that Dairy Queen and Beacon Theatres affect the validity of issue preclusion by collateral estoppel which arises from a former adjudication. The Supreme Court held:

It is thus clear that the Court in the Beacon Theatres case thought that if an issue common to both legal and equitable claims was first determined by a judge, relitigation of that issue before a jury might be

foreclosed by res judicate or collateral estoppel. To avoid this result, the Court held that when legal and equitable claims are joined in the same action, the trial judge has only limited discretion in determining the sequence of trial and "that discretion . . . must wherever possible, be exercised to preserve jury trial." Id. at 510, 79 S.Ct. at 956.

Both the premises of Beacon Theatres, and the fact that it enunciated no more than a general prudential rule were confirmed by this Court decision in Katchen v. Landy, 382 U.S. 323. In that case the Court held that a bankruptcy court sitting as a statutory court of equity, is empowered to adjudicate equitable claims prior to legal claims, even though the factual issues decided in the equity action would have been triable by a jury under the Seventh Amendment. If the legal claims had been adjudicated first, the Court stated:

"Both Beacon Theatres and Dairy Queen recognize that there might be situations in which the Court could proceed to resolve the equitable claims first even the results might be dispositive of the issues involved in the legal claim." Id. at 339, 86 S.Ct. at 478.

Thus the Court in Katchen v. Landy recognized that an equitable determination can have collateral-estoppel effect in a subsequent legal action and that this estoppel does not violate the Seventh Amendment.

439 U.S. at 334-35, 99 S.Ct. at 653. Thus, it is clear that, under Parklane Hosiery, the plaintiff is barred by the doctrine of collateral estoppel from pursuing her claim against defendant Spivey.

The plaintiff argues that, in spite of Supreme Court precedent, this Court should allow her to proceed because Judge Bartlett refused to allow her to proceed because Judge Bartlett refused to allow her to join defendant Spivey in her original action against General Motors. This argument is untenable for several reasons. First of all, plaintiff never filed a formal motion to join defendant Spivey or to consolidate the two separate actions. Second, the law is clear that defendant Spivey could have been named

as a defendant in her first lawsuit, even if he had not been expressly named in the EEOC charge of discrimination. See, e.g., Greenwood v. Ross, 778 F.2d 448, 451 (8th Cir. 1985) (The plaintiff's attorney had a duty to recognize this before filing her lawsuits). Third, plaintiff learned of the existence of diversity jurisdiction on October 30, 1986, yet she failed to file the present lawsuit until March 10, 1988. And finally, plaintiff was aware of the possibility of collateral estoppel barring this action because she wrote a letter to defendant's counsel on April 8, 1987, informing him that she intended to use it against defendant Spivey after the lawsuit against defendant GM. See Defendant's Exhibit G attached to defendant's supplemental brief supporting motion for summary judgment. The plaintiff gambled that collateral estoppel

would work in her favor. Because Judge Bartlett found for defendant GM, however, she now wants the Court to let her relitigate the identical issues which were decided by Judge Bartlett. This is exactly the situation collateral estoppel is designed to prevent.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted. It is further

ORDERED that defendant's motion for partial summary judgment is denied as moot. It is further

ORDERED that plaintiff's motion for summary judgment or partial summary judgment on defendant's counterclaim is denied as moot. It is further

ORDERED that defendant's motion for leave to amend answer is denied as moot. It is further

-D12-

ORDERED that this case is dismissed with
prejudice.

By: S/S
SCOTT O. WRIGHT
United States District Judge

April 19, 1989.

APPENDIX E

Findings of Fact, Conclusion of Law
and Order Granting Judgment for
Defendant and against Plaintiff in
Plaintiff's Title VII Claim Against
GM (Case No. 87-0048-CV-W-9)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MELODY PERKINS,

No. 87-0048-CV-W-9

Plaintiff,

v.

GENERAL MOTORS CORPORATION,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER GRANTING JUDGMENT FOR
DEFENDANT AND AGAINST PLAINTIFF
FILED APRIL 10, 1989

I. Introduction

Plaintiff Melody Perkins brings this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, et seq. Perkins, a female supervisor at the General Motors (GM) Fairfax Plant in Kansas City, Kansas (Fairfax), contends that she was unlawfully discriminated against by G.M. on the basis of her sex in violation of

Section 703 of the Act, 42 U.S.C. Section 2000e-2.

Perkins maintains that she was the victim of sexual harassment between August 1979, and January 1986, while employed at the Fairfax plant.¹ Specifically, Perkins, an avowed homosexual, claims that as a condition of her employment she was forced to have sex with Thomas Spivey, the body shop superintendent and her indirect supervisor, from shortly after she began her employment in 1978 until 1985, when she terminated the relationship. Perkins maintains that in order to obtain sexual favors, Spivey threatened her job and her life and the life of her lesbian lover. She maintains that sex with Spivey was always unwelcome and she points to her homosexual lifestyle and 14 year relationship with her lesbian lover to emphasize the unwelcomeness

of Spivey's conduct. Perkins contends that the acts of Spivey constituted quid pro quo sexual harassment and created a sexually hostile work environment.

Perkins also claims that she was subjected to an unwelcome sexually hostile work environment at Fairfax because of the acts of other male employees.

G.M. acknowledges that Perkins and Spivey had a sexual relationship but argues that the relationship was instigated and pursued by Perkins in order to advance her career at G.M. and to demonstrate to her parents, who did not approve of her homosexual lifestyle, that she was a worthy daughter.

G.M. asserts that Perkins failed to establish that she was subjected to an unwelcome sexually hostile work environment.

This action was heard by the court sitting without a jury between November 1, 1988, and January 9, 1989.

II. Findings of Fact

1) As a child, Melody Perkins was sexually abused by her father, a neighbor, neighborhood boys and a bus driver. Her alcoholic mother physically abused her throughout her childhood.

2) After one particularly brutal beating by her mother, Perkins left home at age 18 and moved in with Joseph Holub, a man she later married. During the brief time they lived together, Holub physically abused her. When his abuse became too much for her, Perkins left him, moved in with her grandparents and filed for divorce.

3) Shortly after leaving her husband, she enlisted in the United States Army.

4) While in the Army she met and started a homosexual relationship with Jessica Glenn which culminated in their being "married" in a ceremony conducted by a lesbian friend in July 1974. They regarded this ceremony as

having the same effect as a legal marriage and they pledged a life of fidelity to each other. When Perkins told her parents about her relationship with Glenn, they objected strenuously and thereafter were largely alienated from Perkins.

5) The Perkins/Glenn relationship has continued for 14 years. Although Glenn's problems with alcohol strained the relationship, the relationship has lasted because Perkins and Glenn love and care about each other.

6) Although Perkins enjoyed her service in the Army, she did not reenlist because of what she called "witch hunts" by military authorities to eliminate homosexuals from the Army.

7) After leaving the Army, Perkins was accepted by the Federal Aviation

Administration for training as an air traffic controller. After completing her initial training at the FAA training center in Oklahoma City, Oklahoma, she was assigned to Ballard Field in Topeka, Kansas.

8) While working for the FAA in Topeka, Perkins and Glenn had a number of difficulties that resulted in physical assaults on one another. In June 1977, Perkins went to the Veterans Administration Hospital in Topeka for assistance and was referred to a psychiatric social worker for evaluation. She told the social worker during an interview that although she was involved in a primary homosexual relationship with Glenn, she "still enjoys men." The social worker was sufficiently concerned about her stability, especially in light of her occupation, that he scheduled her for a complete psychiatric evaluation. Perkins

failed to keep three appointments for this evaluation.

9) In June 1978, Perkins believed that she was partially responsible for a near disaster while on duty as an air traffic controller. She felt that she could no longer handle the stress of her job and approached the Veterans Hospital in Topeka for medical justification to be relieved of her duties. This justification was provided by the V.A. in a letter to her Tower Chief indicating that "her increasing anxiety over her job responsibilities are sufficiently high that in her best interest serious consideration should be given to the idea of relieving her of her present duties." Perkins was then placed on a leave of absence from the FAA.

10) On June 19, 1978, while on leave from the FAA, Perkins applied at the Fairfax plant on the recommendation of a female friend who

was employed at the G.M. Leeds plant in Kansas City, Missouri.

11) Perkins was initially interviewed by John Muehlbach of the personnel department. He felt that she was a good candidate because her service in the Army and as an air traffic controller indicated an ability to work under pressure and to supervise others.

12) Perkins was also interviewed by several superintendents at the plant, including Thomas Spivey, who was superintendent of the body shop.

13) Perkins was first employed by G.M. Fairfax on July 24, 1978, as a salaried employee in training. She was the first female hired for a production supervisor's position from outside the hourly rolls at the plant.

14) Perkins was told that she would be entering a training program that would expose her to all facets of automobile assembly.

Also, she was advised that during her training, she would have to sufficiently impress a superintendent or department head so that she would be sponsored for regular employment in that department after her training. She was also told that if she had not received an offer of employment from a superintendent or department head at the end of her training, she would be released.

15) Shortly after Perkins began her training, Spivey asked her to work for him in the body shop. Perkins was excited about the prospect of finding a sponsor so early in her training and told Glenn how pleased she was to have made such a good impression so early.

16) Perkins successfully completed her supervisor in training program on March 1, 1979, and became a regular supervisor in the body shop performing various supervisory duties until May 1, 1980, when she was laid

off as part of an economic reduction in force.

17) Perkins was ambitious and wanted to be promoted to higher management levels as demonstrated by her career interests shown on her annual appraisals. Specifically, she wanted to be the first woman promoted to general supervisor in a production department and eventually she wanted to be superintendent or plant manager.

A. Perkins' Quid Pro Quo Claim

18) Both Perkins and Spivey testified that a sexual relationship existed between them. Their testimony about how often they met and where they met was by and large consistent. However, they disagreed about whether Perkins was coerced to participate in the relationship. For the reasons indicated below, I believe Spivey's testimony and disbelieve Perkins' testimony about how the

relationship began and the reasons it continued.

19) Perkins testified that in August 1978, shortly after she started to work in the body shop, Spivey told her that he would like to take her home with him that evening. She initially refused but agreed after Spivey said that if she did not he would fire her. He then gave her a key and written directions to his apartment. She drove herself to his apartment and waited for him to arrive. When he arrived, he forced her to take off her clothes and have sex with him. He demanded that she spend the night. She declined saying that Glenn would be worried. Under pressure from Spivey, she called Glenn and told her that she would be staying with her grandparents that evening. Perkins testified that she and Spivey had sex several times that night. At one time during the night,

Spivey waived something at her. Perkins believes it may have been a knife.

20) Perkins testified that thereafter Spivey made similar demands on her approximately twice a month from August 1978, until May 1980, when she was laid off. These encounters with Spivey were usually right after work and lasted two to two and one-half hours with the actual sex only taking a small part of the total time. According to Perkins, the balance of the time they drank cocktails and talked about such things as work, Perkins' goals and ambitions, Jessica Glenn, Perkins' prior marriage, Spivey's daughter and Spivey's interest in horse racing. On some occasions, Spivey prepared a meal or brought in food.

21) Perkins testified that she did not want Glenn to know of these encounters with Spivey so Perkins told her that she was late coming home from the plant due to "meetings

related to her job."

22) Perkins testified that several times during 1978-80 she failed to meet Spivey at his apartment or at a motel as he directed. Spivey threatened her with a knife or a gun and threatened to kill or injure Glenn.

23) Perkins testified that in 1979 Spivey forced her to go on a three day fishing trip to Grand Lake, Oklahoma. While there, Spivey would leave the room for hours and lock her in a closet. When he returned, he brought her a Pina Colada. In order to keep Glenn from finding out about the trip, Perkins suggested to Spivey that they send Glenn to California where Glenn's family lived. The airplane ticket was paid for by Spivey.

24) Perkins testified and Spivey corroborated that during their relationship, Spivey gave plaintiff an ankle bracelet and gold letter "M" pendant. She wore the pendant and told Glenn that it was a Christmas

present from her hourly employees. Perkins gave Spivey a collector's Corvette emblem she obtained while working in Bowling Green, Kentucky.

25) Perkins testified that Spivey frequently suffered from alcohol induced impotence. To assist with penetration he would use her vibrator to stimulate her and increase lubrication.

26) Spivey testified that shortly after Perkins began working in the body shop, she made it apparent to him that she was available and interested in having sex with him. He admitted that he invited her to his apartment and gave her a key and directions. When he arrived at his apartment, plaintiff was sitting in a chair reading a magazine, clad only in his bathrobe, having taken a bath prior to his arrival. They had sex several times and she spent the night.

27) Spivey testified that thereafter he and Perkins engaged in a consensual affair meeting approximately two times a month from August 1978, until May 1980, when plaintiff was laid off. She told him of her homosexual relationship with Glenn but said that she still liked sex with men. He corroborated plaintiff's testimony that their meetings lasted two to two and one-half hours and that no more than 15 to 20 minutes of that period involved sex. The remaining time was spent in casual conversation. He acknowledged that he occasionally fixed meals or brought in food.

28) He corroborated the trip to Grand Lake but denied that it was coerced. Perkins enjoyed fishing and they both wanted the opportunity to be able to go out in public. He denied locking her in a closet. He verified that he paid for Glenn's ticket and that it was Perkins' idea to send Glenn home.

29) I am persuaded that Perkins and Spivey went to Grand Lake, Oklahoma, for a three day fishing trip in 1979 and that Perkins welcomed the opportunity to travel out of town with Spivey. It was Perkins' idea to send Glenn to California and Spivey paid for Glenn's airplane ticket. I do not believe Spivey locked Perkins in a closet. The locked-in-the-closet gloss on the Grand Lake trip is an illustration of Perkins' fertile imagination.

30) Spivey denied that he ever used any threat or coercion to secure sexual favors from Perkins and testified that plaintiff would initiate their meetings about one third of the time. He enjoyed sex with Perkins and felt she enjoyed it as well.

31) In October 1979, Muehlbach was working at the G.M. plant under construction in Bowling Green, Kentucky. When he learned of the Fairfax layoff, he contacted Schmer,

General Supervisor of Salaried Personnel, to determine which female supervisors were on layoff because he needed qualified females to meet his affirmative action obligations. He hired three female supervisors (Perkins, Linda Sims and Delores Clemoens) for the Bowling Green plant.

32) Perkins did not want to go to Bowling Green but was persuaded by Glenn to go in order to get away from Perkins' parents and also because Glenn's family was originally from that area of Kentucky.

33) While at Bowling Green, Perkins frequently spoke highly of Spivey and the Fairfax plant and stated that she would like to return to Fairfax if the opportunity arose.

34) Spivey testified that plaintiff got in touch with him when she was in Kansas City in December 1981, and asked to meet him. They

had sex on that occasion and she gave him the Corvette emblem.

35) While at Bowling Green. Perkins learned that Fairfax was going to return the second shift from lay off. Perkins telephoned Spivey and requested his assistance in getting back on at Fairfax. After she was laid off at Bowling Green, Fairfax offered her a position and she returned to the body shop at Fairfax in May 1982.

36) Perkins' and Spivey's testimony about the resumption of their sexual relationship after Perkins' return to Fairfax is partially consistent. Where inconsistent, Spivey's version is more credible.

37) Perkins testified that Spivey made no effort to resume the relationship between May 1982, when she returned, and October 1982, when he demanded with threats to her

employment and well-being that the sexual relationship resume. According to Perkins, she was forced to have sex with him two or three times between October 1982, and January 1983.

38) Spivey agrees that their sexual relationship was renewed in the fall of 1982. He testified that he was seeing another woman when Perkins returned from Bowling Green and that he did not want to get involved with Perkins again. However, Perkins was insistent and because he enjoyed sex with her, he agreed. They had sex two or three times before she went to Operation Wyandot.

39) Perkins testified that Spivey made one demand for sex between January and October 1983, while she was assigned off site to Operation Wyandot, a training program instituted by the Fairfax plant to increase cooperation among its employees.

40) Perkins' testimony about one act of sex with Spivey during this period is contrary to her interrogatory answers where she denied having any sex with Spivey between January and October 1983. Her trial testimony would help explain a complaint that she made to her gynecologist in August 1983, that she was experiencing pain during deep penetration.

41) Perkins testified that after Operation Wyandot, Spivey demanded sex from her twice a month from October 1983, until July 1985, excluding only the period January to April 1985, when she was on the second shift and Spivey was on the first.

42) Perkins testified that in April 1985, while at Spivey's residence in Gladstone, Missouri, Spivey took her out on the balcony, held a long barreled, large caliber revolver over her shoulder, fired it into the ground

and told her to imagine what that bullet would do to her head. He then took her into his bedroom, tied her with neck ties to the bed in a spread eagle fashion and forced the barrel of the pistol into her vagina, cocked it, removed it and then had sex with her. She sought no medical attention for injuries caused by the gun but did go to a park to sit on the cool ground.

43) Spivey denies that the gun incident occurred. He points to the serious damage to the side of one's face and ear that would result from having a large caliber revolver fired in the manner Perkins described.

44) I do not believe that the gun incident occurred. The residential setting of Spivey's house makes it unlikely that a gun fired in mid afternoon would not attract concerned attention. Furthermore, Perkins did not report this attack to anyone, including

her attorney and psychological counselors, until March 1987, two years later. The tendered explanation by one of Perkins' psychological counselors for this delay was not persuasive. Also, on one day during her trial testimony she identified a Ruger revolver as the gun Spivey used; the next day she changed her testimony expressing doubt that the gun was the same one Spivey had used in April 1985. Overnight, Perkins realized how implausible her story was given the size of the barrel, the height and size of the front sight and the manner in which she claimed Spivey used it. Perkins' description of the incident seems to be the result of a fertile and twisted imagination.

45) Perkins testified that on occasion during their sexual encounters, Spivey would hold a knife taken from behind his belt buckle to her throat and trace the outline of

her body with it while threatening her with injury or death. Spivey denies using the knife to threaten Perkins.

46) Perkins has failed to persuade me that she was ever threatened with the knife. Considering all the testimony about the belt buckle knife, including a demonstration engineered by plaintiff's counsel that reached ludicrous levels even for this case, I am persuaded that it was worn by Spivey and used by him in the same manner some people use a pocket knife.

47) Spivey testified that the relationship resumed after Operation Wyandot and continued until March or April 1984. He terminated the relationship because Perkins was making demands upon him to use his influence to have her promoted to a general supervisor vacancy created by the death in December 1983 of Jack Reynolds, a body shop

general supervisor. Spivey testified that thereafter Perkins learned that another woman, Kathy Tucker, had been promoted and became the first female general supervisor in a production department at Fairfax.

48) After receiving her performance appraisal in the summer of 1984, Perkins went to Cinda Clark, EEO supervisor, to complain that she believed Spivey had altered her suitability for promotion rating on that appraisal. Clark obtained the appraisal, reviewed it with Perkins and they agreed that Perkins' concerns were unwarranted. Notably, Perkins did not complain about Spivey's alleged sexual demands, threats or the atmosphere in the plant that plaintiff now contends was so offensive to her.

49) Perkins testified that while on vacation in the Bahamas in July 1985, she contemplated suicide but then had a religious

experience in which she realized that if she committed suicide she would not go to Heaven. On the other hand, if Spivey killed her she was confident that she would go to Heaven. Therefore, when she returned from vacation, she terminated the relationship with Spivey. She told him that she no longer cared if he carried out his threats.

50) Perkins testified that once she told Spivey that she would no longer have sex with him, he continued to demand sex. When she continued to refuse, she claims that he retaliated by 1) having her transferred from a preferred assignment in High Bay back to the body shop, 2) causing a poor evaluation of her in September 1985, 3) depriving her of the necessary manpower to perform her duties satisfactorily and 4) causing her to be more closely scrutinized by her superiors.

51) In the summer of 1985, after she

claimed to have told Spivey that she would no longer have sex with him, Perkins began to have problems with "door fits" in her department in High Bay. When these problems could not be resolved to her satisfaction with the body shop supervisors or Spivey, she complained to Arthur Hester, the production manager, who was Spivey's superior. Despite the opportunity to do so, Perkins made no complaints to Hester about Spivey's alleged sexual demands.

52) Perkins' transfer from High Bay was a result of this door fit problem, not anything Spivey did. The decision to transfer Perkins was made by William Holek, acting superintendent of the body shop.

53) Although Perkins normally received her annual appraisal in July, she did not receive her 1985 appraisal until September 13, 1985. That appraisal included the August

1985-July 1985, period, as well as August and part of September 1985, and reflected the problems Perkins was experiencing in High Bay. It was the lowest appraisal she had received at G.M.

54) Perkins complained about this appraisal to Schmer and Joelle Thomas (then EEO supervisor) whom Perkins knew from when Thomas was labor relations representative for the body shop. Perkins told them that she felt it was not fair for an appraisal to reflect performance difficulties occurring after the appraisal should have been given. Also, Perkins said that she had not been properly counseled about these deficiencies prior to receiving the evaluation. Again, she did not mention to Thomas or Schmer Spivey's alleged demands for sex or her belief that Spivey was responsible for the low appraisal. As a result of Perkins' complaint, her

performance was reevaluated by Holek and her evaluation was raised to a satisfactory level. Spivey's only role in this evaluation was his suggestion that Holek consider Perkins' complaint.

55) There was no credible evidence that Perkins was treated differently than other supervisors in terms of having the people necessary to do the work in her area. Also, Perkins was not scrutinized more closely by the body shop general supervisors.

56) In the latter part of 1985 and early 1986, it was well known among the Fairfax salaried work force that the planned move to the new Fairfax plant would result in substantially fewer hourly and salaried employees in the production process. Supervisors at Perkins' level with relatively short length of service were considered to be at risk. During this time, Perkins contacted

Sonny Lyman, the union bargaining chairman, to seek his assistance in obtaining a position at Fairfax that would increase her chances of being selected for the new plant.

57) During the fall of 1985, Perkins enrolled in a business law course at Penn Valley Community College. Thereafter, she told several co-workers that she had a plan to "get" G.M. and that she would not have to work again.

58) Spivey testified, and I find it credible, that on January 27, 1986, Perkins came to him to demand a promotion or a "pencil pushing job" out of the body shop and that if she did not get what she wanted, she "was a woman in a man's world and was going to get what [she] wanted any way [she] could." He told her to "take your best shot."

59) Perkins testified that Spivey approached her on January 27, 1986, for the

last time and demanded sex from her. When she refused, Perkins said that he threatened her life and her job. Then according to Perkins, Spivey, the then acting general superintendent, directed Keith Powell, acting general supervisor, and William Holek, acting superintendent of the body shop, to criticize Perkins during a housekeeping tour of her area on January 30, 1986.

60) Housekeeping in Perkins' area was criticized justifiably. Other supervisors were criticized as well. Upon hearing the critical evaluation, Perkins used the Open Door Policy² and went immediately to see Schmer and Hester telling them that Spivey had been raping her since 1978 and that as a result of refusing Spivey's demands for sex, she was being harassed by her supervisors in the body shop.

61) After being interviewed by Hester and

Schmer, Perkins left the plant, went to see an attorney and prepared and EEOC charge of discrimination alleging sexual harassment. Her attorney then arranged for her to be admitted to the psychiatric unit at St. Luke's Hospital.

62) Hester and Schmer reported their interviews to Timothy Danahy, personnel director, who undertook a full investigation of Perkins' claims. Interviews were conducted with Spivey, Holek, Powell, other supervisors who were also subjected to the housekeeping tour, Lisa Calovich (a student training with Perkins), the female supervisors of the body shop and later, after the allegations of a sexually hostile work environment surfaced in Perkins' lawsuit, all of the female supervisors at Fairfax. Because she was under a doctor's care, Perkins was not interviewed until April 1986.

63) Following a thorough investigation, G.M. concluded that Perkins' allegations were uncorroborated and implausible, that Spivey had not sexually harassed Perkins and that she had not been harassed by the supervisors in the body shop. However, G.M. determined that Spivey had shown extremely poor judgment by becoming involved in a consensual sexual relationship with a subordinate. He was demoted from the bonus eligible group of G.M. management and transferred to a G.M. plant in Atlanta, Georgia.

64) Perkins testified that she never reported Spivey's acts to the police, Glenn or to anyone in authority at G.M. She testified that she was unable to do so because of her fear of Spivey, the lack of an appropriate complaint procedure at G.M. and her past history as a victim of sexual and physical abuse. I do not believe that if

Spivey had been sexually harassing her, she would not have availed herself of the readily available and known complaint procedures, including the Open Door Policy. Throughout her employment, Perkins was aware of the avenues available to her to express any concerns or complaints she might have about problems on the job.

a) For example, on Perkins' first day of employment, Schmer and Muehlbach advised her that some employees might resent being supervised by a female. She might experience rough language on the floor and possibly unwelcome sexual advances. She was told to take any problems which she could not handle to her superiors. Perkins assured them that she had encountered these problems in the military and that she did not expect anything she could not handle.

b) During her Fairfax pre-supervisory training, Perkins received training on her equal employment opportunity rights and responsibilities as a supervisor from Cinda Clark, then the EEO supervisor. In this training Clark explained G.M.'s legal obligation not to discriminate on impermissible grounds, including sex, and that the EEO supervisor was available for internal complaints of discrimination.

c) In the latter part of 1979, G.M. implemented a management women's program at Fairfax coordinated by Clark to assist women production supervisors. Participation was voluntary but most of the female supervisors, including Perkins, participated. No complaints of unwelcome sexual conduct were raised

by Perkins or any other female supervisors during these meetings.

d) Perkins knew she could bring complaints about sexual harassment and other problems to the EEO supervisor. Perkins complained in 1981 to Kathy Herkleman, the Bowling Green EEO supervisor, about sexual comments made to her by an hourly employee at that plant. The matter was resolved to her satisfaction. In 1984, Perkins complained to Clark that Spivey had altered her eligibility for promotion rating on her annual appraisal. In September 1985, Perkins contacted Joell Thomas, then the EEO supervisor, about her late annual appraisal.

e) In 1984 or 1985, Jack Clay, an hourly employee in the body shop under Perkins' supervision, touched

Perkins on the breast. She immediately exercised her supervisory authority and had Clay taken to labor relations for a disciplinary interview. Labor relations concurred in Perkins' recommendation that Clay be counseled about his inappropriate conduct. The matter was resolved to Perkins' complete satisfaction.

f) In 1985, when Perkins was experiencing the "door fit" problem in High Bay, she went to Hester, the production manager and Spivey's supervisor, to complain that she felt Spivey and the body shop were not responsive to her suggestions for solving the problem.

g) In January 1986, Perkins went to Hester and the personnel department under the G.M. "Open Door" policy to register her first and only complaint

about Spivey's alleged sexual acts.

65) Despite the testimony of Perkins' psychological counselors, I was not persuaded that their Post-Traumatic Stress Disorder (PTSD) diagnosis corroborates Perkins' version of her affair with Spivey. My impression was that PTSD is the current diagnosis of choice with Perkins' psychologists and they fit their patient to that diagnosis. Also, because Perkins participated in the relationship with Spivey for her own personal gain and because Perkins failed to persuade me that the relationship or any even in it was a credible stressor beyond the realm of normal human experience, the stressor essential for the diagnosis does not exist.

66) During the entire trial, including numerous conferences, I had an opportunity to observe and evaluate Perkins. Also, I observed Spivey when he testified. Based upon

these observations and upon all of the credible evidence, Spivey's version of the Spivey/Perkins relationship was credible and Perkins' version was not. The sexual relationship with Spivey was welcome to Perkins. In reaching this conclusion, I rely not only on the findings previously made but also on the following:

a) Perkins is not the downtrodden victim she attempted to portray through the trial; Perkins is an intelligent, articulate, aggressive, ambitious, tough and friendly person who has good people skills. She was and is a strong person, well able to fend for and defend herself.

b) Before Perkins came to G.M., she had escaped from stressful or unpleasant situations. She was able, upon reaching majority, to escape from her abusive parents; she left an

abusive husband; she left the Army when she believed that her homosexuality would be discovered; she left the FAA when the stress became too great. However, when allegedly victimized by Spivey, she made no attempt to leave G.M. or even to complain.

c) Perkins hoped that the relationship with Spivey would advance her career at G.M. Perkins is ambitious in the sense of succeeding in what she perceives to be male dominated workplaces. Using Spivey, a macho male in her view, to accomplish this goal pleased her. Also, by being the first woman general supervisor she hoped to win the respect of her parents.

d) Perkins was a supervisor, not an hourly employee. Therefore, she had

regular contact with upper management.

e) Viable and effective complaint procedures were available at Fairfax that were known to and used by Perkins while employed there. Yet, she did not utilize any of these procedures to seek relief from years of alleged threats and assaults until after the sexual relationship had been terminated by Spivey and after another woman had been promoted.

f) Because Perkins and Glenn convinced me that their relationship was close, warm and communicative, it is incredible that, if things were as Perkins says, Perkins would not have shared her pain with Glenn or that Glenn would not have observed Perkins' tortured behavior and press for an explanation.

g) In late 1979, Perkins made no effort to dissuade Glenn from going to work at Fairfax even though Perkins was by this time involved in what she says was a violent relationship with Spivey. If Perkins' version of the affair were true, she would not have wanted Glenn to work in the same location as the man who was threatening Glenn's life.

h) Also, if Perkins were telling the truth about the nature of the relationship with Spivey, it makes no sense that she told people at Bowling Green how much she missed Fairfax and frequently called back to the body shop to see how her old friends at the plant were doing. Despite the safety of being several hundred miles away from Spivey, she made no complaints about him to G.M.

management or other authorities. When she learned of the possibility of the recall of the second shift at Fairfax, she telephoned Spivey to seek his assistance in returning to her old job in the body shop under his supervision. None of the attempted explanations as to why someone who had escaped from such a situation would voluntarily return reasonably explain re-exposing herself to the demeaning, life threatening and abhorrent behavior she claimed to have been subjected to by Spivey.

i) David Hiatt's testimony about his conversation with Perkins in late 1978 or early 1979 about Spivey "sexually harassing" her is not credible. At that time, a year before the EEOC Guidelines on Sexual

Harassment were issued, that term was uncommon the legal community, much less among hourly production workers.

j) Perkins was not exclusively homosexual as she claimed. She had been married, admitted she had initiated sex with her husband, became pregnant and had an abortion. A year before she came to G.M. she told a Veterans Administration Psychiatric Social Worker that although she was involved in a homosexual relationship with Glenn, she was a bisexual who still liked sex with men on occasion, a statement she reiterated to Spivey when they began their relationship. She complained to her gynecologist of pain during intercourse in August 1983, during a time she was not seeing Spivey, yet testified that she

and Glenn used no devices during their sex other than a small vibrator. Plaintiff offered no reasonable explanation for why a true lesbian would tolerate a regular sexual relationship with a man. Perkins was also unable to persuasively explain why Spivey would engage in a long-term sexual relationship with somebody who found sex with a man distasteful.

k) In December 1985, Perkins told Gary Maltbia, the union Employee Assistance Program Coordinator, that she had been having an "affair" with Spivey. Also, she told Sonny Lyman after she left the plant that she once thought she loved Spivey and would "do it all over again" if she could only get a promotion.

l) In contrast to the many aspects of Perkins' story that make no sense, Spivey's testimony about the relationship was credible. Spivey's credibility is enhanced by his admitting the relationship when first confronted with Perkins' allegations. His demeanor on the stand was consistent with the words he used. His answers to questions were direct in marked contrast to Perkins' frequent evasiveness and acting.

m) Women supervisors, including many called by Perkins, testified that Spivey was a gentleman who never approached them in a sexually offensive way.

B. Perkins' Hostile Environment Claim

67) Perkins claims that she was subjected to an unwelcome sexually hostile work

environment through her employment at Fairfax resulting from the acts of Spivey and the acts of other male employees at the plant.

68) The acts of Spivey asserted as a basis for the sexually hostile work environment claim are identical to those relied upon for the quid pro quo claim. My findings on the quid pro quo claim dispose of this aspect of the sexually hostile work environment claim.

69) The other incidents about which Perkins complained at trial are of two types: directional, i.e., specifically directed at her, and nondirectional, i.e., not specifically directed at her but observed or overheard by her.

70) Representative of the events that Perkins claims caused her environment to be sexually hostile are the following:3

a) She was subjected to catcalls, whistles and comments by male employees throughout her employment at Fairfax.

b) She was propositioned from 15 to 50 times a day by men at the plant throughout her employment at Fairfax.

c) Jack Clay, an hourly employee in the body shop, touched her on the breast in 1984 or 1985. She exercised her authority as a supervisor and had him sent to labor relations for a disciplinary interview. The nature of his punishment was left to her discretion. She decided that in light of his exemplary work record and length of service the appropriate punishment was formal counseling. This counseling was conducted by Perkins and Sonny Lyman, Chairman of the Union Shop Committee. Perkins was

satisfied with the way this incident was handled.

d) Ron Welch, a maintenance department general supervisor, told Perkins in 1984 that "if you don't use your pussy, you will lose it." When she told him that she did not like such comments, he told her that he would not make such comments any more.

e) In 1985 she found a hot dog in her desk with a condom on it. She did not know who placed it there.

f) in late 1985, Greg Hendricks, an hourly employee under her supervision, made a "humping motion" in her direction when he objected to the job she had assigned him. She then told him that if he did not do what she told him, she would "castrate him in the pit," referring

to the worst job in her group. When Hendricks complained to his union committeeman the committeeman supported Perkins.

g) From time to time throughout her employment, George Lewis, a supervisor in the body shop, and Don Kyle, a supervisor in the maintenance department, would make motions with their hands simulating masturbation in her presence.

71) Perkins also testified about the following non-directional incidents: she overheard jokes of a sexual nature; observed men grab their genitals and "shake" them at one another; and heard "shop talk," i.e., nondirectional profanity by employees, male and female.

72) Perkins' testimony about the prevalence of catcalls and propositions for sex was not credible. Based on the testimony

of other witnesses who were more credible, catcalls were directed on occasion to new women who appeared on the production floor such as visitors and newly hired employees. No other witness confirmed that sexual propositions occurred at the rate suggested by Perkins. Based on all the evidence, her testimony on this point seems to be more creative than factual.

73) The directional conduct about which Perkins complains was welcomed and encouraged by her. Perkins was an active and encouraging participant in sexually explicit conversation and actions. Her use of "shop talk" was well known and thought by some to be extreme even for the environment. She was observed goosing men or pinching or patting them on their buttocks, putting her hands inside the front of men's coveralls and on one occasion brushing her hand across the genitals of a fellow supervisor and asking him, "Is that

your pickle?" I reject the suggestion that Perkins engaged in this activity solely because she had no choice if she was going to work on the production floor at Fairfax. Based on Perkins' background before coming to G.M. and on her performance over many years at G.M., I am persuaded that Perkins enjoyed the give and take with men and women on the production floor. She took pride in her people skills and had a genuine interest in a close relationship with the people she supervised. The environment was welcome and familiar to her.

74) When her encouragement of and participation in sexual horseplay precipitated unwelcome conduct, Perkins knew how to use the available disciplinary procedures and had the supervisory power to stop the conduct and punish the offender. When Perkins complained or made it known that she did not like the conduct, the conduct

ceased immediately or was dealt with appropriately.

75) For all these reasons and on the basis of my assessment of the credibility of the witnesses and all of the evidence offered at trial, including Perkins' various offers of proof, I find that Perkins was not subjected to unwelcome conduct of a sexual nature, the submission to which was made either explicitly or implicitly a term or condition of her employment. Furthermore, submission to or rejection of unwelcomed conduct of a sexual nature was not used as the basis for any employment decision affecting her. She was not subjected to an intimidating, offensive or sexually hostile working environment.

III. Conclusions of Law

1) Perkins, a female supervisor at the General Motors Fairfax plant in Kansas City, Kansas, brings this action under Title VII of

the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, et seq. contending that she was sexually harassed in violation of Section 703 of the Act, 42 U.S.C. Section 2000e-2.

2) Jurisdiction and venue are proper in this court. 28 U.S.C. Sections 1331, 1343, 1391; 42 U.S.C. Section 2000e-5(f)(3).

3) Plaintiff bears the burden of persuasion as to each essential element of her claim; she must establish the existence of each element by a preponderance of the credible evidence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).

4) Preponderance of the evidence means the greater weight of evidence. "It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate." Smith v.

United States, 726 F.2d 428, 430 (8th Cir. 1984). "If, upon any issue in the case, the evidence appears to be equally balanced, or if it cannot be said upon which side it weighs heavier, then plaintiff has not met his or her burden of proof." Id.

5) This case has been decided primarily upon credibility of the witnesses and particularly the credibility of the two principals, Melody Perkins and Thomas Spivey. In making credibility determinations, I have considered the relationship of the witnesses to the parties, the witnesses' interest in the outcome of these proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe and acquire knowledge of what they were testifying about and the extent to which the testimony was supported or contradicted by other credible evidence. See Shrout v. Black Clawson Co., 689 F. Supp. 774, 775 (S.D. Ohio 1988).

6) The gravamen of any sexual harassment claim is that the alleged acts of misconduct were "unwelcome." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 68 (citing 29 C.F.R. Section 1604.11(a)). The conduct complained of must be "'unwelcome' in the sense that the employee did not solicit or invite it, and the employee regarded the conduct as undesirable or offensive." Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986). In analyzing this element of a sexual harassment claim, courts have looked to a number of facts:

a) Whether plaintiff by her own conduct indicated that the alleged sexual advances were unwelcome. Vinson, 477 U.S. at 68.

b) Whether the plaintiff substantially contributed to the alleged distasteful atmosphere by her own "profane and sexually suggestive

conduct." Gan v. Kepro Circuit Systems, Inc., 28 Fair Emp. Prac. Cas. 639, 640-41 (E.D. Mo. 1982); Smith v. Acme Spinning Co., 40 Fair Empl. Prac. Cas. 1104, 1105 (W.D.N.C. 1986).

c) Whether the plaintiff in response to evidence that at various times she had willingly participated in the conduct now complained of can "identify with some precision a point at which she made known to her co-workers or superiors that such conduct would hencefore (sic) be considered offensive." Loftin-Boggs v. City of Meridan, 633 F. Supp. 1323, 1327 n.8 (S.D. Miss. 1986), aff'd mem., 824 F.2d 971 (5th Cir. 1987). See also EEOC Policy Guidance on Sexual Harassment, reprinted in Daily Labor Report (BNA) No. 201,

Section E (Oct. 10, 1988) at 3.

d) Whether and, if so, when plaintiff reported or complained about any of the incidents at issue. Highlander v. K.F.C. National Management Co., 805 F.2d 644, 646, 650 (6th Cir. 1986); Scott v. Sears, Roebuck & Co., 798 F.2d 210, 214 (7th Cir. 1986); Acme Spinning Co., 40 Fair Empl. Prac. Cas. at 1109; Neville v. Taft Broadcasting Co., 42 Fair Empl. Prac. Cas. 1314, 1317 (W.D.N.Y.), aff'd mem., 857 F.2d 1461 (2d Cir. 1987); Jensen v. Kellings Fine Foods, Inc., 1987 U.S. Dist. Lexis 7221; Spencer v. General Electric Co., 697 F. Supp. 204, 210 (E.D. Va 1988).

e) Whether plaintiff's account of the "unwelcome" sexual conduct is sufficiently detailed and internally consistent so as to be plausible.

EEOC Policy Guidance at 3.

f) The nature of the work environment itself. Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 430 (E.D. Mich. 984), aff'd, 805 F.2d 611, 620-21 (6th Cir. 1986); Hall, 842 F.2d at 1017-18.

A. Quid Pro Quo Claim

7) As the Sixth Circuit noted in Highlander v. K.F.C. National Management CO., 805 F.2d 644 (6th Cir. 1986):

Quid pro quo sexual harassment is anchored in an employer's sexually discriminatory behavior which compels an employee to elect between acceding to sexual demands and forfeiting job benefits, continued employment or promotion, or otherwise suffering tangible job detriments. In a quid pro quo action, the employee bears the burden of proof to support charges that submission to the unwelcomed sexual advances of supervisory personnel was an express or implied condition for receiving job benefits or that a tangible job detriment resulted from the employer's [sic] failure to submit to the sexual demands of supervisory employees.

Id., 805 F.2d at 648. See Hall v. Gus Construction Co., Inc., 842 F.2d 1010, 1013 (8th Cir.1988); Jones v. Wesco Investments, Inc., 846 F.2d 1154, 1156 (8th Cir. 1988).

8) In order to establish a quid pro quo claim of sexual harassment, plaintiff must prove each of the following elements: 1) that she was a member of a protected class; 2) that she was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; 3) that the harassment complained of was based on sex; 4) that her submission to the unwelcome advances was an express or implied condition of receiving job benefits or that her refusal to submit to a supervisors's sexual demands resulted in a tangible job detriment; and 5) the existence of respondeat superior liability. Highlander, 805 F.2d at 648; Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).

9) Perkins was a member of a group of persons protected by Title VII, i.e., females.

10) Perkins failed to establish by a preponderance of the evidence that she was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors. To the contrary, Perkins welcomed the sexual relationship with Spivey. She entered into the relationship and remained in it for years to enhance her career at G.M.

11) Not surprisingly in light of the previous finding, Perkins failed to establish that Spivey's advances were unwelcome, that they were an express or implied condition of receiving job benefits or that her refusal to submit to Spivey's sexual demands resulted in any job detriment.

B. Sexually Hostile Work Environment Claims

12) Plaintiff's claim of a sexually hostile work environment violative of Title VII is in two parts: a) the acts of Spivey which form the basis of her quid pro quo claim and b) acts of other male Fairfax employees.

13) In order to establish a sexually hostile work environment sufficient to establish a violation of Title VII, plaintiff must prove each of the following elements: 1) that she belongs to a protected group; 2) that she was subjected to "unwelcome sexual harassment: 3) that the harassment was based on sex; 4) that the harassment affected a "term, condition or privilege" of her employment; and 5) that the employer knew or should have known of the harassment and failed to take proper remedial action. Hall v. Gus Construction Co., 842 F.2d 1010, 1013 (8th Cir. 1988); Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986).

14) For the reasons previously stated, neither Spivey nor the relationship with Spivey subjected Perkins to unwelcome sexual harassment affecting a term, condition or privilege of employment.

15) With regard to Perkins' claims based on the actions of other male employees at Fairfax, Perkins failed to establish by a preponderance of the evidence that she was subjected to conduct of a sexual nature which she found to be unwelcome, except for isolated incidents. Perkins was an active, encouraging participant in sexually explicit conversations and actions. In those few circumstances where the conduct went too far, she demonstrated that she had the ability to take care of the situation and to stop that conduct.

16) With regard to the fourth element that the unwelcome sexual harassment affected a term, condition or privilege of employment,

Perkins is required to establish that the unwelcome conduct was "sufficiently severe or pervasive [so as] to alter the conditions of [the plaintiff's] employment and create an abusive working environment." Vinson, 477 U.S. at 67 (emphasis added). To satisfy this element, the sexual harassment must be so severe and pervasive that it both 1) unreasonably interferes with plaintiff's work performance and 2) creates an intimidating, hostile or offensive working environment that seriously affects plaintiff's psychological well-being. See, e.g., Rabidue, 805 F.2d at 619. Moreover, plaintiff must satisfy this two-prong element from an objective "reasonable person" standard.

To accord appropriate protection to both plaintiffs and defendants in a hostile and/or abusive work environment sexual harassment case, the trier of fact, when judging the totality of the circumstances impact upon the asserted abusive and hostile environment placed in issue by the plaintiff's charges, must adopt the perspective of a reasonable person's

reaction to a 'similar environment under essentially like or similar circumstances. Thus, in the absence of conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances, a plaintiff may not prevail on asserted charges of sexual harassment anchored in an alleged hostile and/or abusive work environment regardless of whether the plaintiff was actually offended by the defendant's conduct.

Rabidue, 805 F.2d at 620; see also EEOC Policy Guidance at 4.

17) Plaintiff must generally show a "campaign of harassment" that was "systematically directed to [her]," Hall, 842 F.2d at 1014-16, and that the harassment is sustained and not trivial. Moylan, 792 F.2d at 749-50; Scott, 798 F.2d at 214; Rabidue, 805 F.2d at 622. In making determinations on this element, courts look to such factors as 1) the nature of the unwelcome sexual acts or words; 2) the frequency of the offensive encounters; 3) the total period of time over

which all of the offensive conduct occurred; and 4) the context in which the sexually harassing conduct occurred. Ross v. Double Diamond, Inc., 672 F. Supp. 261, 270-71 (N.D. Tex. 1987).

18) Perkins has failed to satisfy her burden that the few credible unwelcome incidents reasonably affected a term, condition or privilege of her employment.

19) With regard to the fifth element, plaintiff has failed to establish that G.M. knew or should have known of the harassment about which she complains and failed to take appropriate action. As noted above, Perkins made no complaint about the vast majority of the incidents while still employed at G.M. In those instances when she did complain, the credible testimony established that appropriate corrective actions were taken either by plaintiff individually or in her

capacity as a supervisor or by management or union officials at Fairfax.

IV. Conclusion

20) Based upon these findings and conclusions, Perkins has failed to establish by a preponderance of the evidence that General Motors discriminated against her on the basis of her sex in violation of the provisions of Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2.

V. Order

Accordingly, it is hereby ORDERED that:

1) the clerk shall enter judgment in favor of defendant and against plaintiff with costs taxed to the plaintiff; and

2) any post-trial motions the parties desire to file, including any motions or applications for attorney's fees, costs or expenses, shall be filed within 20 days from the date of this order.

-E67-

By: S/S

D. BROOK BARTLETT

UNITED STATES DISTRICT JUDGE

Kansas City, Missouri

April 10, 1989

1 Title 42 U.S.C. Section 2000e-5(e) states that only incidents that allegedly occurred within 300 days prior to the filing of the EEOC charge are actionable. At the September 23, 1988, oral argument on defendant's summary judgment motions, plaintiff voluntarily dismissed all claims for damages arising from incidents occurring in 1978, 1979 and 1980. Testimony of alleged incidents occurring during this period were considered as background evidence only. However, because of the possibility that plaintiff might have established a "continuing violation," evidence was heard on plaintiff's claims from May 1982, when Perkins returned from Bowling Green to Fairfax until January 1986, when she filed her EEOC charge. In light of the ultimate disposition of this case, a definitive ruling on the statute of limitations question became unnecessary.

2 Under the "Open Door" policy which is well publicized in G.M.'s booklet for salaried employees, an employee is authorized and encouraged to bring problems to his or her supervisor or, if that is inappropriate because the supervisor is involved, to the personnel department or higher levels of management.

3 Other incidents referred to by Perkins were not significantly different in nature or character from those listed in this finding. The additional events referred to by Perkins are no more credible or persuasive than the ones referred to in the findings.

APPENDIX F

District Court's Order Dismissing
Negligence Claim Against G.M.
(Case No. 86-0665-CV-W-9 &
87-0048-CV-W-9)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MELODY PERKINS,

No. 86-0665-CV-W-9

No. 87-0048-CV-W-9

Plaintiff,

v.

GENERAL MOTORS CORPORATION,

Defendant.

ORDER DISMISSING CASE NO 86-0665
Filed October 28, 1988

I. Duty

On May 27, 1986, plaintiff filed her complaint in the negligence case (No. 86-0665-CV-W-0, later transferred to Division 9) alleging:

13. GM during the term of Perkins [sic] employment with it, and continuing to this date, is charged pursuant to the commonlaw and the terms of plaintiff's employment [sic] with it with the duty of providing a safe place in which Perkins can work; that said duty includes, the duty to provide a place to work free of sexual harassment and taking those steps necessary to ensure that its women are free of sexual harassment, are secure in the knowledge that if they report same to

management, action will be taken against the male employees to ensure the woman's future safety and well-being.

14. That during the term of Perkins [sic] employment with GM, GM has failed in its duty to her as set forth in paragraph 13, subjecting her and other women at Fairfax to sexual harassment by its managers including but not limited to Thomas Spivey and William Holek.

Id. at 3.

At the October 21, 1988, pretrial conference, I asked plaintiff's counsel to state what claims are being asserted in the negligence case. Counsel replied that plaintiff alleges that defendant hired and retained unsuitable employees because General Motors hired and retained one or more employees who physically and psychologically harassed female employees. Also, counsel stated that plaintiff asserts that defendant failed to adopt and implement policies to assure plaintiff a safe workplace. Finally,

counsel asserted that the common law duties of an employer in Kansas include the duty to follow the statutes of the state, specifically, the Kansas statute prohibiting discrimination. (Plaintiff does not assert a claim under the Kansas statute prohibiting employment discrimination.)

At the pretrial conference defendant argued that under Kansas common law, it did not owe these duties to plaintiff. I asked both parties to submit briefing on the duties imposed on employers under Kansas common law. Defendant responded by filing a motion to dismiss or, alternatively, for summary judgment asserting that an employer in Kansas has no common law duty to provide a workplace free of sexual harassment. Thus, defendant argues that it violated no common law duty owed to plaintiff.

Plaintiff's opposition fails to counter persuasively defendant's argument and

authorities. Accordingly, for the reasons stated in defendant's October 26, 1988, memorandum in support of its motion to dismiss or for summary judgment, plaintiff's negligence claims under Kansas law will be dismissed for failure to state a claim for relief. An employer in Kansas does not owe its employees any duty under the common law to protect them from the risks and the type of injury plaintiff suffered.

Plaintiff has failed to distinguish Gabbard v. Sharp, 167 Kan. 354, 205 P.2d 960 (1949). In Gabbard, the plaintiff asserted that her employer negligently failed to provide a safe workplace because he allowed Tom Sharp to work with plaintiff when defendant employer knew 1) that Tom Sharp "was a man enamored of women and particularly this plaintiff" and 2) that Tom Sharp drank intoxicating liquor at work and 3) when Tom Sharp drank he "became more aggressive in his

advances toward women in and about said restaurant, and particularly the plaintiff."

In reviewing the trial court's failure to grant a motion to dismiss plaintiff's amended petition for damages resulting from an assault by Tom Sharp, the court stated:

While the question is not here in controversy it should, perhaps, be stated that in this jurisdiction the general, well-established, rule is that while an employer may be held liable to one of his employees for wrongful acts of a fellow servant done in the pursuance of the objects of his employment and in furtherance of his duties he is never liable for such acts when they are committed outside the scope of such servant's employment.

Id. 167 Kan. 15 356-57 (citations omitted).

Here, plaintiff has not alleged that the injuries she suffered were the result of wrongful acts done in the scope of the employment of the wrongdoing employees.

Also, even though in Gabbard the plaintiff alleged that her employer was negligent in keeping in its employ a person

of known vicious disposition (see Perkins' complaint, Paragraph 16, making the same allegation), the court stated:

The inviolate rule, so far as we have been able to determine, is that notwithstanding the failure of an employer to exercise ordinary care in the employment of his servants, he cannot be held liable, in a case where one servant injures another, if his negligence was merely a condition as opposed to the efficient cause of injury. Here, under unequivocal allegations of the petition, the employer's conduct in retaining the offending employee merely creating a condition which made the action of [the offending employee] possible. The efficient or proximate cause of appellee's injury was his action in stepping aside from his employment and in committing an assault upon appellee.

Id. at 358-59 (citation omitted).

Similarly here, taking plaintiff's allegations in her complaint as true (as I must), the proximate cause of plaintiff's injury was an employee or employees stepping aside from their employment and assaulting and harassing plaintiff.

II. Assumption of Risk

An additional reason for reversing the trial court's failure to grant defendant's motion to dismiss in Gabbard was that:

Under clear and unambiguous allegations of her petition it appears that she knew as much if not more than appellant about the dangerous and violent characteristics of her fellow servant, with whom she elected to continue to work notwithstanding that knowledge. The rule in this jurisdiction is that if an employee knows that another employee is incompetent, or habitually negligent, and continues to work without objection, and without being induced by his employer to believe that a change will be made or that his employment will be made less dangerous he assumes the risk and hazards, of which he has full and complete knowledge, incident to such employment.

Id. 167 Kan. at 359. Applying this rule, the court concluded that plaintiff had assumed the risk of the harm she suffered from the assault.

On October 19, 1988, I rejected defendant's contention that plaintiff had assumed the risk of the harm she suffered. On

October 21, 1988, defendant filed a motion to reconsider. After having studied defendant's motion and plaintiff's opposition filed October 26, 1988, and after rereading Kansas cases discussing assumption of the risk, I now believe that my earlier opinion reached an erroneous conclusion. Rather than applying Gabbard to the undisputed facts of this case, I attempted to summarize the discussion about assumption of the risk in several Kansas cases. In doing so, I tried to figure out what the Kansas courts meant when they said that an employer must be negligence free before it can rely on the defense of assumption of the risk. This quest led me to reach an erroneous conclusion about the application of assumption of the risk to this case whatever the Kansas courts mean by the statement that an employer must be negligence free, Gabbard points the way to the proper result in this case.

Even if it is assumed that General Motors failed to provide a safe workplace and/or failed to hire and retain suitable employees, plaintiff knew as much, if not more, about the risks as General Motors. Her voluntary return to General Motors' Fairfax Plant in 1982 demonstrated the type of venturesome attitude upon which assumption of the risk is grounded in Kansas.

Accordingly, for the reasons stated in 1) defendant's May 9, 1988, motion for summary judgment at pp. 1-17, 2) defendant's July 11, 1988, reply at pp. 1-20 and 3) defendant's October 21, 1988, motion for reconsideration, summary judgment will be granted for defendant because plaintiff assumed the risk of the harm she suffered.

III. Statute of Limitations

On October 14, 1988, defendant filed a motion seeking application of the Kansas statute of limitations to events occurring

before 1984. Defendant incorporated by reference its prior discussion about the application of the statute of limitations to events between 1978 and 1980.

On October 19, 1988, plaintiff filed her opposition stating: 1) "plaintiff would . . . seek leave to amend to leave out those damages suffered by her as a result of actions taken by Spivey directed at her prior to May, 1984," and 2) "she does not conceive that the actions of GM taken prior to May of 1984 are excluded by the statute of limitations." Plaintiff's Opposition at 2.

Because of my decisions on the previous two issues, defendant's motion on the statute of limitations will be denied as moot.

IV. Conclusion

Therefore, it he hereby ORDERED that plaintiff's negligence case, No. 86-0665-CV-W-9, is dismissed.

-F11-

By: S/S
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri

October 28, 1988.

APPENDIX G

Amendment VII--Civil Trials

AMENDMENT VII-CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX H

F.R. Civ. P. 38

Jury Trial of Right

F.R. Civ. P. 38
Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

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